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In the matter of: :
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COMPULSORY LICENSE FOR MAKING :
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AND DISTRIBUTING PHONORECORDS; : CRT Docket No. 80-2
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ROYALTY ADJUSTMENT PROCEEDING :
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(MECHANICAL) :
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2100 K Street, N.W.
Room 610
Washington, D.C.

Wednesday, July 9, 1980

The hearing in the above-entitled matter commenced
at 10:05 a.m., pursuant to notice.

BEFORE:

MARY LOU BURG, Chairman
THOMAS C. BRENNAN, Commissioner
DOUGLAS E. COULTER, Commissioner
CLARENCE L. JAMES, JR., Commissioner
FRANCES GARCIA, Commissioner

APPEARANCES:

ALVIN DEUTSCH, Attorney-at-Law
FREDERICK GREENMAN, JR., Attorney-at-Law
Counsel for AGAC

MORRIS B. ABRAM, Attorney-at-Law
RICHARD M. ZUCKERMAN, Attorney-at-Law
Counsel for NMPA

JAMES F. FITZPATRICK, Attorney-at-Law
CARY H. SHERMAN, Attorney-at-Law
JILL B. DEAL, Attorney-at-Law
Counsel for RIAA

C O N T E N T S

WITNESS: Direct Cross Redirect Recross

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EXHIBITS:

Identified:

RIAA Exhibit M	129
RIAA Exhibit N	150

P R O C E E D I N G S

MR. BRENNAN: Madam Chairman, we now have pending before us a modified motion of RIAA questioning the production of certain data by the music publishers.

MR. ZUCKERMAN: Madam Chairman, we have not been served with a voting motion.

MR. BRENNAN: We do not plan to vote, Counsel, on the motion; I am just making a speech.

MR. FITZPATRICK: I think we sent the vote to New York and down here; so we will have copies for you.

MR. DEUTCH: Where did you send it down here?

MR. FITZPATRICK: I don't know. I will have to check with the person who did the serving.

MR. BRENNAN: In connection with our eventual consideration of this motion, I would like to borrow Commissioner James' hypothetical question with some modifications. I would now like to address the hypothetical to the music publishers and I see no need to involve the Supreme Court in this discussion of this motion.

I and other Commissioners are well acquainted with the legal and economic arguments which have been advanced by the music publishers against the production of data covered by this motion; however, let us assume the the tribunal does not find those objections to be persuasive and that in due course, we would adopt a motion generally along the lines of the pending motion.

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1 It would assist this Commissioner in the consi-
2 deration of the pending motion if the music publishers were
3 to submit any suggestions which they may have as to the
4 feasibility and scope of that motion. I believe the motion
5 sufficiently frames the issue for our decision, but in
6 terms of our subsequent actions, it might be useful for
7 RIAA to be a little more precise as to exactly the areas
8 in which information is being requested.

9 Madam Chairman, it might be useful if these
10 comments would come in, perhaps, by next Tuesday. With
11 that, I yield the floor.

12 MR. ABRAM: Madam Chairman, I deeply regret that
13 I cannot even be slightly responsive, having not foreseen
14 the motion; I only say that our disposition will be to be
15 as fully cooperative as we possibly can; but I know that Com-
16 missioner Brennan realizes, as a lawyer, I can't possibly
17 respond to something unfortunately I have not even seen.

18 I can't understand why I haven't seen it.

19 CHAIRMAN BURG: Mr. Fitzpatrick, will you ckeck,
20 and also, it doesn't have to be responded to right now,
21 Mr. Abrams. If you can get sufficient copies by the af-
22 ternoon session on the floor --

23 MR. ABRAM: All right, well, we will have them.

24 CHAIRMAN BURG: But it does not need response
25 now; now will I rule on that page until they have had a

1 chance to read the motion. Ms. Deal, would you please
2 proceed with your witness? Would the witness please stand
3 to be sworn, please?

4 Whereupon,

5 STANLEY KAVAN

6 was called as a witness and, after first being duly
7 sworn, was examined and testified, as follows:

8 MS. DEAL: We have Mr. Stanley Kavan here this
9 morning, he is here under heroic circumstances. He has a
10 back spasm, which is causing terrible pain, and trying to
11 minimize his moving around.

12 CHAIRMAN BURG: I am sorry I asked you to stand,
13 under the circumstances.

14 THE WITNESS: It is quite all right. The thing
15 is I got a different chair.

16 DIRECT EXAMINATION

17 BY MS. DEAL:

18 Q For the record, Mr. Kavan, would you state
19 your name and address and describe your professional back-
20 ground in the record industry?

21 A My name is Stanley Kavan; I come from Connecti-
22 cut, Milford, Connecticut. And until two years ago, when
23 I left the employ of CBS to pursue some personal ambitions,
24 I had been in the employ of CBS all my professional life
25 since the mid-forties.

1 And I held a variety of responsibilities over that
2 time in the marketing, accounting, development areas, and given
3 that tenure and given a responsibility, I can say that I
4 either observed or participated in most of the technological
5 changes that occurred since the mid-forties.

6 Q Mr. Kavan, would you tell the tribunal why you
7 are here to testify?

8 A I am here to discuss Criteria C, Technological
9 Contribution, and how it relates to cost and risk and its
10 impact on opening markets.

11 Q Would you summarize the importance of technolo-
12 gical change in the recording industry, the riskiness in-
13 volved in making these changes and why taking these risks
14 is worth while?

15 A The development of new products or new processes
16 as they affect the manufacturing routine is a major ongoing
17 activity with the record industry, spearheaded principally by
18 the major firms.

19 The objective, the constant objective is to im-
20 prove the product. To make it better, to make it cheaper,
21 to make it easier for the customer to use. And whenever you
22 fulfill one of these objectives that always adds growth and
23 velocity to the business.

24 It must be remembered that the purchase of a
25 bit of recorded music is a wholly discretionary action,

1 competing with other leisure time activities, movies,
2 television, books, sports; and the music industry must
3 re-vitalize itself, re-energize itself, always, to compete
4 with those pressures. And if you ask about risks, there
5 are enormous risks in doing that.

6 I have likened it before to wrestling with a
7 bear, a tiger, sometimes you come away with a fur coat
8 and sometimes you get bitten. And I have experienced both.
9 I have particularly experienced the problems with respect
10 to change, introducing a new product, and phasing out an
11 old one, and the costly, burdensome problems of change in
12 pressing, change in packaging, change in merchandising,
13 particularly the burdensome problem of duplicate inven-
14 tories, triplicate inventories, quadruplicate inventories.

15 But they are unavoidable if the business is to
16 grow and prosper. I go back to a time when it was incon-
17 ceivable to think that the record business would be as
18 big as the motion picture business or the book business,
19 which in fact it is. And in a large measure, how it got
20 there is a consequence of things like the LP, like stereo
21 and tape, without which this might be a very minor busi-
22 ness, similar as it was to -- in the 30s, when it was
23 about \$5 or \$6 million in total gross.

24 Q Would you describe your professional experience
25 at CBS in areas other than technological development?

1 A In the mid-sixties, Mr. Paley wanted very much
2 to diversify the nature of his operations. We were essentially
3 a broadcasting and record making company. And being
4 familiar with the bounds within CBS records, I was asked
5 if I would shepherd the responsibility of getting CBS Records
6 in new areas; and I did that for a few years, looking at a
7 few things like retailing, the purchase of a tape manufacturing
8 plant, musical instruments, and also music publishing.

9 We like very much the business of music publish-
10 ing; we were in it in a small way. We were quite familiar
11 with its profitability. We liked the investment nature of
12 owning copyrights, the endless stream of income you can
13 get from having a decent copyright, so over a few years,
14 I contacted probably over a hundred publishers, to use a
15 round number, with whom we had some serious conversations,
16 in an attempt to expand our own publishing operation.

17 Q Mr. Kavan, you stated that historically, record
18 companies have always taken big risks and incurred high
19 R&D costs to open up new music markets. Would you give us
20 some examples from your career at CBS?

21 A The most dramatic example I can give you is to
22 tell you about the introduction of LPs, and the most fas-
23 cinating thing I can say about it is that were it not for
24 LP, I doubt that any of us would be here today, because
25 no one would care about conversation about allocating

1 equity, because I think there would be very little
2 equity to allocate.

3 To refresh your memory, to what the business
4 was like before LP, this was the product. 70 rpm albums,
5 heavy, burdensome, costly, breakable, low-wearing character-
6 istics, really not a very handsome piece of goods. And in
7 one major stroke, the LP eliminated all those impediments
8 A long-playing record, a less expensive record, an un-
9 breakable record, great wearing capabilities, a high
10 fidelity record, and not only did it have marvelous consu-
11 mer benefits, but it had enormous trade benefits too.

12 It allowed record albums to be merchandised on
13 a self selection basis, the impulse factor in a store,
14 which has been so important to the growth of the record
15 business. It allowed us to expand distribution of records
16 from some 2,000 outlets in the forties to 40 or 50 thousand
17 outlets at a later point in time.

18 It allowed the marketing of records by the
19 direct mail, which was never done before LP. It stimulated
20 the broadcastability of records and it helped radio sustain
21 the onslaught of television in the early fifties. And there
22 are those that hold, were it not for the LP, that FM radio
23 would not have survived its early formative years.

24 I would like to have you see, look close, if
25 you would --

1 Q Could you tell us more about the competitive
2 climate around the time that CBS was developing and introdu-
3 cing the LP?

4 A Those were responsible for the stewardship of the
5 industry, the record industry, really believe that unless
6 the impediments of the 78 rpm album could be overcome, the
7 business would never really be a meaningful business, and
8 CBS approached it with the LP.

9 RCA felt the same way; they approached it with
10 a concept called the "45" rpm. And for several years ensued
11 what we look upon as the famous Battle of the Speeds.

12 Q Would you define more clearly, I think it has
13 been mentioned before, what do you mean by the Battle of
14 the Speeds?

15 A Well, both of us went ahead in the marketplace,
16 to try to have our respective concepts become the dominant
17 one, so that throughout a two- or three-year period, it
18 reduced itself to where the LP became the dominant mode
19 for albums and the 45 rpm concept became the dominant mode
20 for singles; and remains to this day.

21 Q What were CBS' costs for developing LP?

22 A It was about a \$5 million production with some
23 residual expense later on. While that may not sound like a
24 big figure, if you bring it forward to today's dollars, you
25 are talking about a \$50 or \$60 million commitment. It was a

1 very major undertaking for Columbia. I have got to remind
2 you that at that point in time, Columbia was not
3 dominant company. RCA was far and away the leader in
4 the 40s, probably twice the size of Columbia, and Columbia
5 was probably third. Decca, I think, might have been second.
6 I think they had a strong group of artists, Crosby, the
7 Andrews Sisters, the Mill Brothers, the Ink Spots, and
8 Columbia was a small company grossing maybe about \$20
9 million, so the impact of that kind of commitment was
10 very meaningful for Columbia at that time.

11 Q What technological changes did CBS have to make
12 to develop and market the LP?

13 A We almost had to re-learn the business. Every-
14 thing was different about the LP. It affected the pressing
15 operation, packaging operation, the merchandising operation,
16 we had to do that and still continue the 78 rpm titles as
17 well. And it was more than a product line; it was really
18 a new industry.

19 LP was the beginning of the modern record
20 industry. Let me show you the impact of LP graphically.
21 This is a 12-year cutout of the velocity of the record
22 business, and you can see that prior to LP in 1946, it
23 was really on a downward slant, and in 1948 in the midst
24 of recession, which gives you an idea of how smart we
25 were about planning, LP was introduced. And weathered

1 three recessions.

2 It weathered the advent of television, which
3 is looked upon as one of the big dramatic elements of the
4 century, in the Battle of the Speeds. And at the time of
5 its introduction, 10 years later, the business trebled.
6 And I think that is a dramatic illustration of what LP
7 brought to the industry, because without it, I think it
8 would have just been a story of doom and gloom.

9 Q Were these technological changes that you made,
10 in developing the LP, typical of changes CBS would need to
11 make in introducing any new product?

12 A Well, very much so, maybe not in as large measures
13 as the introduction of LP, but product development affects the
14 entire chain of activity, recording, manufacturing, packaging,
15 merchandising.

16 Q What would have happened if CBS had failed in the
17 LP?

18 A It would have been very seriously crippled. It
19 might have been fatal, given the fact that we are a very
20 small company with a very large commitment.

21 Q What was the impact of the LP on artists?

22 A In the popular field, which is the field of
23 particular interest here, it changed the direction for the
24 way that artists approached creative expression. This
25 was the business before LP. And the popular album market

1 was a very small market before LP. The classical business
2 was larger than the popular album business at that time.
3 Albums were basically a collection of single records.
4 This is an LP of Sinatra, which is just a transfer of a
5 78 rpm album, 4 records, 8 sides.

6 But when LP came on the market, artists found
7 a new way to approach creative expression; they began to
8 deal thematically; they began to deal in program concepts.
9 This is an album by Michel Legrand, out of Paris. It is
10 more than an album of French music. From the time it
11 starts until the time it ends, there is a sweep and flow
12 about this that is just so special.

13 And it was the forerunner -- it was a landmark
14 album of its kind. It was the forerunner of later albums,
15 Harry Belafonte, Caruso album, couple of years after this.
16 It is in the same genre of things like Sergeant Pepper,
17 Abbey Road, things -- Pink Floyd.

18 It brought a whole different perspective to the
19 making of music by popular artists.

20 Q Did the development and introduction of the LP
21 open new markets for music and increase publishers'
22 mechanical incomes?

23 A Oh, dramatically. By a light year. Again,
24 before LP, publishers' opportunity for exposure was one of
25 two sides of a single record, essentially. Now, with LP

1 that increased multifold. We had 8 selections, 10 selections,
2 12 selections, so that the publishers' mechanical volume
3 increased enormously as a result of the LP.

4 Q When was stereo introduced?

5 A In 1958.

6 Q What impact did the introduction of stereo
7 have on the music market?

8 A A very large impact, because it was a very
9 exciting new music dimension, despite the attributes I
10 mentioned about LP, it was still single point source sound,
11 and stereo allowed us to give dimension to music. We were
12 able to suggest the concert stage left and right, flavor
13 to it, and artists were very eager to participate in it.
14 It was a very adventuresome time for the music industry.

15 Q Did CBS have to make technological changes
16 for stereo comparable to those for LPs?

17 A Yes. We had to do everything twice. We didn't
18 come with a compatible record initially. That was developed
19 later. We had to make two pressings, two packagings. We
20 had to merchandise these side by side in the store, which
21 is a terrible taxing costly burdensome routine.

22 Q Did the advent of stereo open new markets for
23 music and increase publishers' mechanical incomes?

24 A No question -- what happened when stereo was
25 introduced is that people went back and re-purchased favorite

1 titles that they owned in mono. For instance, we recorded
2 My Fair Lady in 1956. And it was a very big hit. We re-
3 recorded it with the original cast in 1959, I think. And
4 people re-purchased the Fair Lady title just to have the
5 stereo; a lot of that went on.

6 Q Mr. Gortikov stated that another new development,
7 tapes and cassettes, were introduced in the early 1960s.
8 Would you care to comment?

9 A I think that Mr. Gortikov anticipated it a little
10 early. The tape explosion happened towards the early part
11 of the mid-sixties. There were a variety of tape modes
12 that had orbited that were flourishing. These are some
13 examples.

14 You may remember a man by the name of ^{MUNTZ}~~Munce~~,
15 better known as Madman ^{MUNTZ}~~Munce~~, who introduced a four-track
16 concept. That was succeeded by development by Lear, Learjet
17 fame, of an 8-track concept, longer playing time. There was
18 also a tape cartridge called the playtape, which MGM
19 committed itself to.

20 There was, and still is, the cassette, which
21 you are familiar with. And of these, it reduced itself
22 to the 8-track and cassette, which became the dominant
23 tape modes today. The cassette, you know, can be recorded,
24 the track, you can't reverse, so it is not a medium for
25 duplicating, won't duplicate.

1 Q What did the introduction of tapes and
2 cassettes do to the music market?

3 A It made music portable for the first time. You
4 take music where you want it, to be with you. Automobile
5 use. You could take it to the beach, park, on vacation.
6 It opened up a whole new dimension of -- for the use of
7 music. Gave music almost a functional use, and today tape
8 now enjoys a market share of close to 40 per cent of all
9 the dollars.

10 Q Are tapes substitutes for records?

11 A Tapes were additive, because it is a different
12 product, and it was used differently. There is some dual
13 use of tapes, yes. People enjoy it in their car. They
14 also enjoy it at home. But basically the initiative for the
15 tape velocity came from new uses of music that weren't
16 really on the market, and put on tape because of the
17 flexibility you gave it that it didn't have before.

18 Q Did CBS have to make technological changes
19 similar to those incurred with developing LPs and stereos
20 for tapes and cassettes?

21 A By the very nature of the product mode, yes. It was
22 again a very different new business; and we had to build
23 tape duplicating plants, different packaging, the merchandising
24 problem of the tapes are very severe and still continue to
25 be severe. It is a product that walks out of the store

1 very easily. And shrinkage is a terrible problem for
2 retailers. And the record industry still deals with that
3 problem, trying to limit shrinkage, but still allow tapes
4 to be merchandised on a self selection basis, to capture
5 that impulse flavor.

6 MR. COULTER: Excuse me, does "shrinkage"
7 mean what I think it means?

8 THE WITNESS: Theft, yes.

9 You had 100 in inventory when you opened in the
10 morning; you had 98 when you closed at night, yes.

11 BY MS. DEAL:

12 Q Did the introduction of tapes and cassettes
13 benefit publishers by expanding the market for music and
14 increasing publishers' mechanical incomes?

15 A Dramatically so, for the reasons I mentioned,
16 because of its additive nature. It gave them a very big
17 increase in their volume.

18 Q Are there yet other technological activities
19 you have witnesses during your career at CBS?

20 A I have; and some of you have. I understand that
21 many of you have gone through a record plant. But the con-
22 sumer has witnesses these developments. They had to do with
23 the manufacturing process. There is as much time to spend
24 on consumer enhancement as there is on the routine of
25 manufacturing records, like they are more efficient; and

1 we have come along with some very big developments in the
2 making of records and tapes, automated pressing, automated
3 jacketing, high-speed duplication, it's a very big exercise
4 for an integrated company.

5 Q Have there been costs associated with making
6 these changes?

7 A Very much so. Just as an example, CBS has a
8 little research and development operation in Connecticut,
9 which has as its sole objective -- is to enhance the manu-
10 facturing of products, records and tapes.

11 Q Why haven't all these costs and technological
12 changes sharply increased record prices?

13 A Well, it has had a reverse effect, because
14 with these developments, the manufacturing tape, duplicating
15 of the team, we were able to achieve economies of scale.
16 So we were able to achieve record prices down.

17 In 1947, that Rudolph Serkin album that I passed
18 around cost \$6.75. In the shellac mode. Now, \$6.75 in
19 the mid-forties was almost the price of two dinners. I
20 have been told that Laffitte Rothschild sold for \$3 a bottle.
21 At that point in time. And if you take that to present
22 tense, that \$6.75, if you go to dinner, is \$80, \$90. If you
23 buy two bottles of wine, it is about \$80 or \$90 again.

24 But the record, the comparable record, LP, still
25 sells for about the same price that it did in the mid-forties.

1 Q Have publishers benefited from technological
2 changes in recording processes?

3 A Very much so. If you compare the volume we
4 enjoy out of the primitive levels of volume, we had right
5 before LP, there is a light year in difference in terms of
6 the benefits that it -- that they now enjoy.

7 Q Let's talk about current technological developments.
8 Would you give the tribunal some of the examples of these
9 developments and how they will benefit publishers by opening
10 new markets for music?

11 A There is a number of things that are underway.
12 Digital recording, which I am sure you have heard about.
13 There is the looming compact disc, a Phillips innovation.
14 There is video cassette; and there is video disc. There
15 are some examples.

16 Q Why don't we start with digital recording
17 systems?

18 A Digital is a very exciting development; some
19 people believe that it has as much magic as moving from
20 shellac to LP. Let me show you why that is believed.

21 The objective of any record manufacturer is to
22 go from the performance through the recording chain to the
23 consumer, at his home, without any loss of integrity.
24 The consumer, on his end, hears exactly the intentions
25 and nothing more of the original artist and producer.

1 Now, we do a pretty good job of it. We have
2 come a long way since that time. But ironically, we still
3 use the concept that was in sway at the time of Edison's
4 invention. It is called the analog recording concept.
5 It is concept that uses a wave form principle. Electrical
6 wave forms, varying voltages, affect the particles with
7 which a tape is coated; and it is later transferred from the
8 tape recording into a groove of your record, and later de-
9 coated by the consumer with the needle in the turntable
10 so that he hears wave form concept, what the intention of
11 the original performance was.

12 As I say, we do a pretty good job of that.
13 But inherent in the analog process are irritants and
14 impediments, which can effect the performance severely,
15 and in some cases can be avoided entirely; but they al-
16 ways linger there and they always remain there. And
17 just to show you what they are, we have these problems
18 to deal with.

1 But along has come a different approach to
2 recording, called digital. And it looms as a very exciting
3 contribution to the recording arts, because it is a radically
4 different way of approaching music. It is different as
5 approaching a new scale of mathematics, which in fact it
6 does.

7 What happens with digital is that while it starts
8 as a wave form concept, it is immediately intercepted by
9 this little filter with arrows here, and every note is
10 converted to a numerical value. And it is done in lightening-
11 like fashion. It is done in microseconds, one-millionth
12 of a second.

13 So we are able to pack an enormous amount of
14 density in a short bit of time space. And because numbers
15 are absolute, it is encoded at 6-10, as an illustration,
16 it is decoded as 6-10. It is precisely what, on the
17 listening end, is to be heard from the performance end.

18 We use, this is like, not unlike, introducing
19 the computer technology to the recording art. We don't use
20 the current digit scale. I just want to show you -- some of
21 you are unfamiliar with how computers work, and computers
22 work on a "yes-no" positive and negative, dit and dot, like
23 a Morse code. And while traditionally, we deal in the power
24 of ten, 100, 1,000, 10,000, the digital concept is the
25 binary code, which deals with the power of two.

1 So that, if you wanted to write the number 10
2 in the binary code, you would write it as 10. It is 0101,
3 on off, yes, no. And all of this digital information is
4 dealt with in that fashion; and in one revolutionary
5 change, all of these problems are now eliminated. We don't
6 have to deal with them when we have digital perfected.

7 If it were only for this, it would be worth
8 while, to preserve the integrity of the original performance.
9 For instance, none of us has heard Caruso as he sounded in
10 his prime. But with digital technology, 100 years, 200
11 years from now, we will all be able to hear Pafrotias
12 as he sounded in his prime, the Beatles never.

13 It is a terribly dramatic development and will
14 play an important role prospectively in recording arts.
15 However, we are not there all the way. We have only been
16 able to go this far, to the tape recording area, and we
17 have eliminated the vagaries that attended that. This
18 portion here as a playback unit for the consumer has yet
19 to be perfected. There is a prototype working model, but
20 it is still distant for home circulation.

21 Q How many years will it be before consumers
22 can take full advantage of digital recording techniques?

23 A Those who are involved had estimated that it
24 would be about the mid-eighties. Recently, Sony, who
25 has been working in digital, and Phillips, merged interests

1 and it is believed that that would accelerate the advent
2 of digital playback technique; and they are now talking
3 about it being a little earlier. It remains to be seen.

4 Q Are record companies already marketing digital
5 records?

6 A Yes, and no. What we are doing is we are
7 marketing hybrid recordings. We are recording them digitally
8 -- here are a few examples of what CBS has done, but CBS
9 is not alone, in the classical, popular, jazz, these are
10 recorded digitally, but they are transferred to analog
11 concepts for playback. But these have brought considerable
12 benefit. They are cleaner records, they are brighter;
13 they are more dynamic; and you will find quite a wide
14 circulation of these before the year is out.

15 Q Have record companies been forced to incur any
16 costs because of visual recording systems?

17 A Very much so. That little filter that intercepts
18 the wave form converts it to numerical value, that bit of
19 instrumentation costs about a quarter of a million dollars.
20 And a company like CBS would need a number of those, perhaps
21 a million dollars' worth, anybody who is in the recording
22 business would have to make that kind of investment.

23 But it doesn't stop there. There was a need
24 to develop a contaminate free packaging to send these to
25 the factories from the studios. Those of you who have

1 probably seen white rooms or clean rooms, as they are
2 called, this is how they are dealt with. There are
3 digital consoles coming. And that will be another
4 expense.

5 Q Mr. Kavan, would you tell the tribunal about
6 contact discs, video discs, and video cassettes? Let's
7 start with compact discs.

8 A You are familiar with the way we extract the
9 information from a original LP, which is a stylus and
10 groove concept. Now, with digital, we don't use the
11 stylus. We use a laser. And there is no contact with the
12 record. The record does not have grooves. It has pits
13 etched into it. And the laser reads selectively; it reads
14 only what it is supposed to.

15 The things like dust, prints, dirt, will not
16 interfere with the performance; and because of the new
17 density, we are now afforded, we can reduce the 12-inch
18 record to this, as the new LP. This as comparable to the
19 12-inch record, will play for one hour on one side, and
20 it is virtually wearable for a lifetime, because there is
21 no contact.

22 This is the compact disc, as envisioned by
23 Phillips; and they believe that at this point in time
24 will co-exist and possibly replace the LP.

25 COMMISSIONER GARCIA: For that, are you going to need

1 special equipment to play it?

2 THE WITNESS: Yes, this is that device that is
3 yet to be perfected. It is a little unit not unlike a
4 turntable, but it is a digital device for --

5 COMMISSIONER GARCIA: That is also for the records?

6 THE WITNESS: No, that you play on your regular
7 machine. That is compatible with your present instrument.
8 This will require a different playback device.

9 CHAIRMAN BURG: What will that LP sell for, in
10 your estimation?

11 THE WITNESS: I don't know. I don't know that
12 Phillips has ventured a price on it. It could be very
13 attractive to consumers, because you can see that if they
14 use like one seventh, one-eighth the vinyl, you know, that
15 the vinyl is a petrochemical product, and the savings could
16 be in that sense potentially exciting.

17 CHAIRMAN BURG: But you couldn't even hazard a guess
18 at this point as to what it would cost?

19 THE WITNESS: No, I wouldn't. There will be
20 the need to advertise some of that heavy expense in order to
21 circulate this. It should be no more, and hopefully, it
22 should be less.

23 BY MS.DEAL:

24 Q Mr. Kavan, why don't you let me take this
25 round of passing it out?

1 MR. COULTER: What is the effective difference
2 between that and a tape cassette?

3 THE WITNESS: You are talking about pure
4 digital record?

5 MR. COULTER: No, the compact disc.

6 THE WITNESS: As opposed to the present cassette?

7 MR. COULTER: Yes, sure.

8 THE WITNESS: I think it is superior product.
9 It is easier to deal with, long playing time, potentially
10 less expensive, should be.

11 MR. COULTER: It would play longer than a tape?

12 THE WITNESS: Plays for an hour on one side.
13 It is a single sided record.

14 BY MS. DEAL:

15 Q What about the sound quality of the Phillips
16 digital disc?

17 A It will be --

18 Q How would that compare with a cassette?

19 A It will be -- it should be, well, we are also
20 approaching digital for cassette use as well; so that the
21 digital technique will not be exclusively reserved to disc.
22 There will be at a point in time digital cassettes as well,
23 matter of fact, we are now making hyper digital cassettes
24 or recording them digitally, but we are converting them
25 to the wave form process for playback.

1 Q Would you describe the dollar costs and risks
2 recording companies will be taking because of compact
3 discs?

4 A I don't know what the exact costs will be; but
5 they have to be lion-sized. They are two giants, Phillips
6 and Sony. And it is the hope of those in the industry
7 that there will be a single system. There are different
8 approaches to digital. There could be some incompatibility
9 -- nothint is looming as yet. But the costs are terribly
10 meaningful.

11 Q What about shrinkage problems?

12 A That is a very serious problem that we will have
13 to deal with when the digital universe comes along,
14 because we certainly want to retain that self-service
15 impulse factor of merchandising recorded albums, and that
16 digital record is just going to create some very big
17 challenges to allow us to do that. So, you know, we may
18 have to just keep tape jackets out, spindle them or somehow
19 -- we will deal with it, or the record people will deal with
20 it.

21 Q Wouldn't the primary market for these recordings be
22 -- the classical and jazz?

23 A No, and they are not already. Those examples
24 there show that there is a jazz and there is a popular. I
25 know that Fleetwood Mac has a digital LP, Chicago has just

1 recorded one; Rod Stewart just made one. The popular
2 people are going to want it just as fervently as the
3 classical people do.

4 Q How do you envision the growth of digital?

5 A It is hard to say until you know the price
6 sensitivity. If the playback unit come in at an attractive
7 price, and the manufacturing routine can afford an
8 attractive repriced record, it could come quickly.

9 You have got to maybe use the perspective of
10 stereo and mono, but it took 10 years before mono was
11 phased out with stereo. I would guess that the digital
12 thing wouldn't take much longer than that if it were to
13 overcome the traditional LP. I really don't know.

14 Q Will compact disc expand the market for music,
15 or increase publishers' mechanical incomes?

16 A Every time there is a new development, that
17 succeeds in the marketplace, new development consequence,
18 it has a twofold impact on the market. It makes the inactive
19 buyer more active and it brings a whole hoard of new buyers on
20 the market. It raises the consciousness level of music
21 in the marketplace and you could take the growth of the record
22 industry from the time LP was introduced and you could plug
23 in the impact of stereo, of tape, and if you ran that chart
24 out to present tense, you would see that there was almost
25 an unbroken line from the early days of LP to 1978, which

1 was the first down turn; it just went up all the time.

2 Q You mentioned video disc and video cassettes,
3 as two other new product developments. First, what is the
4 difference between a video disc and a video cassette?

5 A Well, they are both audio visual products;
6 a cassette is a tape mode and the disc is a disc mode.

7 Q How will the systems create new home entertain-
8 ment markets?

9 A Well, it is going to personalize the home
10 entertainment. It is not clear whether the video cassette
11 or the video disc is personalized television or it is
12 choreographed audio, in terms of characterizing the product.

13 But instead of going to the Kennedy Center
14 to see a performance, you can bring the Kenne Center
15 to your homes so that you can enjoy Broadway shows, plays.
16 concerts; anybody who has charismatic appeal like Kiss,
17 Pink Floyd, Barbra Striesand, will make wonderful video
18 discs.

19 Q Do you have an example of one of these discs
20 here today?

21 A This is an example of MCA's video disc
22 version of its property, Shenandoah, James Stewart. And
23 this is read by laser, there is no contact. You don't even
24 touch this. This goes into the machine in the envelope,
25 in the sleeve. You might like to see that up closer.

1 Q Unfortunately not. Are some of these systems
2 already being marketed?

3 A Yes. The MCA has been introduced in selected
4 markets; Atlanta, Seattle, I think someplace in the Midwest
5 as well. The RCA concept, you probably have read about, it
6 is going to be introduced in Spring of '81.

7 There is yet a third concept which was developed
8 by Machusta in Japan, JVC, which has been embraced by EMI.
9 And General Records, so that you have now a third system
10 that probably surfaced some time in the end of '81.

11 Q How will video discs affect the record business?

12 A In a very positive way, because it is a different
13 product. It is a -- it supplements the record business. It
14 is an additive product. Those in the record business don't
15 view the video disc as a threat to the record business.
16 It serves a different function. It is a different purpose.
17 The audio quality of the disc is superior to the audio
18 quality of the video disc, and I think will remain that
19 way for a long time.

20 Video disc is not stereo, so that they serve
21 different purposes and they would just complement one
22 another.

23 Q Why are record companies going into video disc
24 if these discs won't compete with records?

25 A It is really logical, because it is a disc,

1 it conforms to all of the exercises one must go through
2 who is in the disc business, and because of its supplemental
3 value, it is a good business to be in -- it will help to
4 spare us from downturns it will help level out peaks and
5 valleys. It is a good business, essentially.

6 Q Has CBS ever had any experience with video
7 disc?

8 A Regrettably, yes. Prior to any of these modes
9 that I discussed, CBS had developed, Dr. Peter Goldmark
10 who developed the LP, developed a video cassette concept
11 called electronic video recording. EVR. This is -- I take
12 you back to the mid-sixties some time. And this is not a
13 tape concept. It is a film concept. And a separate division
14 was established, a plant was built and some \$25,000,000
15 was invested and a decision made not to pursue it.

16 It was believed that it would not be competitive
17 in the face of the looming video cassette modes; that this
18 was only a playback medium, whereas the video cassettes
19 as you know have the sex appeal of record as well. It was
20 an embarrassing exercise.

21 Q And the dates of abandonment and development of
22 EVR were in --

23 A Generally, it surfaced in mid- to late sixties;
24 Motorola, for instance, was the hardware supplier, the
25 machine; and it was abandoned in the early seventies.

1 But there was company for EVR. They remember
2 a thing called "cartovision." This was an ABCO-Embassy
3 device and Sears Roebuck was marketing it, a \$1400 playback
4 machine, to handle cartrovision.

5 And this, also, was abandoned after some, I
6 think, \$40 or \$50 million commitment.

7 Q Sir, what does this sell for?

8 A I believe that came out at \$16.95. And I think
9 that there was a price rise since it was introduced. MCA
10 had a variety of price scales depending upon the nature of
11 the product, of -- I think they had something like \$9.95
12 a songle record to the larger movies that may have taken
13 2 or 3 albums. But I think that was \$16.95.

14 COMMISSIONER GARCIA: Can private people have
15 something to play that with?

16 THE WITNESS: Yes, there is a player. MCA and
17 Phillips merged interests with their video technologies,
18 because they both had laser systems and Magnavox, which
19 became a subsidiary of North American Phillips, brought out
20 the hardware for that, it is currently for sale in selected
21 markets. It was introduced in Atlanta and then later Seattle
22 and the playback unit costs about \$800 I believe.

23 And there is full intent to go nationally.

24 BY MS. DEAL:

25 Q Is it expected that prices for the playback
equipment will remain that high?

1 A It is a very sophisticated development, playback
2 unit. For that machine. One of the attractions to the RCA
3 concept is that the playback system is more conventional,
4 it is a stylus and groove system. And the playback unit
5 will be as reported, less costly than the Phillips unit.

6 CHAIRMAN BURG: Mr. Kavan, didn't this have a
7 use initially as television?

8 THE WITNESS: Some were circulated. There
9 was an industrial use of that. Training films were made.
10 But it never ascended to a home entertainment medium.

11 BY MS. DEAL:

12 Q What are the risks and costs for those that
13 have stayed in the video disc industry?

14 A They are absolutely mind-boggling. I recall that
15 two years ago, in an RCA annual report, they had indicated
16 thaty they were up to \$80,000,000 in terms of their invest-
17 ment in perfecting their video disc cassette. I am told that
18 that \$80,000,000 has been updated to \$130,000,000.

19 MCA, for instance, I first saw their video disc
20 in 1972. They have established back then a separate
21 division for the manufacturer promotion of video discs.
22 That -- before that, they spent a couple of years developing
23 it. So you have, in MCA's case, a condition that was in
24 operation for 10 years that didn't earn a dime of profit.
25 So it was very costly for them, and I am sure very costly for

1 others as well.

2 Q Can all three systems succeed?

3 A In my judgment, no. In the judgment of others,
4 as well. It is unlikely that you would have three
5 compatible video systems, of shelf product nature. In
6 my judgment, it is inconceivable to have two. You will have
7 at least one loser. If it is ICA, that means \$130,000,000
8 and you are likely to have two losers at that point in time.

9 Q CBS still spending money on video discs?

10 A CBS, long before the systems were commercially
11 realized, had been dealing conceptually with some of the
12 manufacturing of elements of making video discs, CBS
13 prides itself on its expertise for mastering. So early in
14 the 70s, CBS had studied mastering technologies, and I
15 think they spent between \$5 and \$10 million just on that
16 kind of thing.

17 Last year, it inaugurated a special division to
18 promote the looming video disc products, the Leisure Time
19 Division.

20 Q Can music be used on video discs?

21 A Oh, very much so. It -- the people who, as I
22 say, have this charismatic appeal will rally to this as a
23 new way of inarticulate expression. There was here a Beach
24 Boys concert that had a very, very big turnout; I am told
25 that was filmed. And that would make a dandy videotape.

1 Q Are video discs subject to compulsory licensing?

2 A No.

3 Q Will home entertainment systems such as video
4 discs and video cassettes open new markets for music and
5 increase copyright owners' income?

6 A No question about that. It is a new, supple-
7 mental product.

8 Q During your career at CPS, did you ever see
9 products developed that were not successssful?

10 A Yes. There is as I say, an ongoing bit of activity
11 with respect to new product development, and let me walk
12 you through a number of them that were kind of left in the
13 locker room, so to speak. The record industry has long
14 been fascinated with miniaturization. Is there any reason
15 why the 12" LP should be 12"? And the answer is "no".
16 It could be done at 7". This is comparable to a 12" LP.
17 This was the experimental version that was made in late
18 60s. And it was market tested in this childrens' album
19 which plays for 3 hours, and it is a book and 7 records
20 in it, all miniature LPs.

21 Now, there was some problems with this. We were
22 anxious for the cost savings impact because everything
23 is less about this, obviously, but there were some trade
24 offs and they affected the dynamics of the records, the
25 producers, and the artists were not enthusiastic about

1 giving up some of their dynamics so that it wasn't brought
2 forward as a institutionalized product, but I must remind
3 you that this was developed in pre-OPEC time, and given
4 the high cost of vinyl, its development may well be looked
5 at again.

6 Q What was your last statement?

7 A It may be looked at again because of its
8 cost saving impact. Not only was there an attempt to
9 miniaturize the albums, there was also an attempt to
10 miniaturize the singles, again, there is a lot of fascination
11 within the record industry to vend records, like cigarettes,
12 so that you can buy a single record wherever you turn,
13 drugstores, street corners, and this concept called the
14 pocket bid, was test marketed, late 60s, early 70s, a vending
15 concept, for a quarter you were able to buy something
16 comparable to a single record. And it was viewed as like
17 an editorial; once you got tired of it, you threw it away.

18 Q It did not succeed. There was problems, there
19 were terrible logistic problems with the vending equipment.
20 But yet it is a concept that lingers still for the record
21 industry to deal with, not only in disc, but also in tape.
22 There have been developments which you are probably not
23 aware of.

24 Sony has wanted to improve the qualities of
25 these existing cassette, and they have introduced

1 a supercassette, better fidelity, longer playing time,
2 it is called the "Elcassette", now, this is marketed
3 in Japan. It requires a new playback device, some of
4 those devices are circulation in the States. My own feeling
5 is I don't know that this will make inroads on the present
6 cassette strength, but Sony believed it might have some
7 market value.

1 They are the most fascinating things I have
2 ever seen. This is a tape called the Newell cassette which
3 is the equivalent of a 12" LP playing time. It is a reel
4 concept, with great fidelity, of low raw material costs,
5 and was developed by a man by the name of Newell who was an
6 Ampex engineer, and we spent some time considering the
7 viability of this marketplace, and we decided not to support
8 its introduction.

9 Timong was against this. This thing surfaced
10 in the late 60s, after 8-track and cassette came institutional-
11 ized in the marketplace and we thought that this would be
12 destructive at that time. But it is a remarkable development,
13 I think.

14 COMMISSIONER GARCIA: Mr. Kavan, what was the playback
15 on this thing?

16 THE WITNESS: Another little different machine,
17 little reel concept, very small, compact, little device, it
18 requires a whole generation of supportive devices, new play-
19 back units, new manufacturing approaches.

20 COMMISSIONER GARCIA: Is that true of these also?

21 THE WITNESS: No, that is compatible with
22 existing equipment. That is just a 7" version of an LP
23 record. You don't -- nothing new is required.

24 What about double throwaway?

25 THE WITNESS: That will track on a regular machine.

1 All of those were compatible. There was also a development
2 -- a more recent one, that you have heard of, I am sure,
3 quadrophonic sound. It added depth to what stereo brought
4 in terms of dimension. The producers and artists would like
5 very much to re-create the effect of the concert hall,
6 because in the concert hall, you have -- you are surrounded
7 with sound. The ambience gives you a different listening
8 quality in the concert which you cannot capture in the home.

9 There are delay devices that are being marketed
10 to suggest that ambience, but quadrophonic sound was
11 developed, four-channel sound, so that you could sit in the
12 center of sound. And re-create the concert hall in your
13 own living room. One of the problems with quadrophonic
14 sound is that there are a number of incompatible systems
15 and there is a lack of a broadcasting standard, and con-
16 sequence of that, the record market became impatient,
17 and enthusiasm eroded and quadrophonic sound is no longer
18 a product in circulation.

19 But I might point out that the compact disc,
20 because of its density, allows us to think anew about
21 quadrophonics, because quadrophonic and digital is very
22 easily accomplished.

23 BY MS. DEAL:

24 Q Why do record companies permit inventions
25 to get to the point that they are workable but are not
marketed?

1 A You have got to let it develop and mature to a point
2 where you make a fair judgment.

3 And it will vary depending upon a development.
4 Sometimes, these things work fine, in the laboratory, but
5 you will find that there are problems, for instance, with a
6 pocket disc. In marketing, and what you don't what to do is
7 kill the kid in the crib, so to speak. You want to let
8 these things mature to a point where you can almost look
9 around the corner so you are making a safe judgment about it.

10 Q Would you consider all these projects to be
11 dead as far as CBS is concerned?

12 A Some of them, yes. But conceptually, the
13 attraction of some of them linger. Miniaturization, for in-
14 stance, has ending possibilities for single records. Those
15 won't go away, and they will be experimented with again.

16 Q Mr. Kavan, let's summarize your testimony about
17 technological change in the recording industry. First you
18 told the tribunal about historical developments such as LP
19 tapes, and stereo.

20 A Yes.

21 Q You stated that all of these new developments --

22 MR. ZUCKERMAN: I object to just a summary of
23 testimony. I think it is a waste of time. If there is new
24 testimony, of course we would like to hear it.

25 MS. DEAL: I thought at this point that it might

1 be helpful just to summarize what Mr. Kavan has gone
2 through. I would defer to the tribunal's judgment.

3 CHAIRMAN BURG: How long is the summary?

4 MS. DEAL: I would like to take a half minute
5 at the most.

6 CHAIRMAN BURG: Proceed.

7 BY MS. DEAL:

8 Q You stated all of these new developments
9 benefitted publishers by creating or expanding new markets
10 for music and thus increase publishers' mechanical incomes.

11 A Yes.

12 Q Mr. Kavan, did publishers contribute anything
13 to developing and marketing LPs?

14 A Not that I know of.

15 Q Did publishers contribute anything to
16 developing marketing tapes?

17 A Not that I know of.

18 Q Stereo?

19 A No.

20 Q You then told the tribunal about technological
21 changes made by record companies which have transformed
22 the process by which record are made.

23 A Yes.

24 Q You stated that the technological changes have
25 benefitted publishers because of low record prices stimulate
sales, and thus increase publishers' mechanical incomes.

1 A Yes.

2 Q Do publishers contribute anything to revolutionize
3 the process by which recordings are made?

4 A Not that I know of.

5 Q Then you told the tribunal about new technological
6 developments such as digital recording, compact discs, video
7 discs, video cassettes.

8 A Yes.

9 Q You stated that all these new developments
10 will potentially benefit publishers by creating or expanding
11 new markets for music and thus increase publishers' mechanical
12 incomes.

13 A Yes.

14 Q Mr. Kavan, have publishers contributed anything
15 to developing and marketing digital recording systems?

16 A Not that I know of.

17 Q Have publishers contributed anything to developing
18 and marketing compact discs?

19 A Not that I know of.

20 Q Video discs?

21 A No.

22 Q Video cassettes?

23 A Not that I know of.

24 Q Finally, you told the tribunal about some
25 products which have been developed by recording companies.

1 But never marketed.

2 A Yes.

3 Q These included the mini-LP, the Newell cassette,
4 the Elcassette and quadrophonic sound.

5 A Yes.

6 Q Did publishers contribute anything to the
7 development of the mini-LP? A No.

8 Q Elcassette?

9 A No.

10 Q The Newell cassette?

11 A No.

12 Q Quadrophonic sound?

13 A No.

14 Q Now, let's talk about your experience as director
15 of development at CBS from 1967-71. Why did you look at
16 publishing companies in addition to other businesses for
17 acquisition?

18 A Publishing is a very natural field for CBS
19 Records to be engaged in. It is a good profitable business
20 to be in. We became aware of publishing with a song
21 called "I believe." Take you back to the early 50s.
22 CBS acquired the copyright of I Believe. And we didn't
23 have a publishing operation of our own at the time. We
24 had the Harvey Richman organization supervise that activity
25 for us, but it was our copyright, and you may remember

1 there was a song of considerable success circulated for a
2 long time, it does still, and we have started, we cranked
3 up a little publishing operation of our own which you know
4 of by the name of April Blackwood, and in the mid-sixties,
5 with this mandate to diversify, that was a very fertile
6 field in our judgment to enhance the growth of the publishing
7 operation, because it is a good business. Once you have a
8 number of good copyrights, it is obvious to you as a result
9 of these hearings, you have an endless stream of income
10 which is just like owning a castle. It just has value all the
11 time.

12 Q What kind of publishers did you look at?

13 A Well, let me give you a disclaimer in front,
14 that there were a number of constraints placed up on us
15 in terms of what we could look at, given our dominant
16 position in the industry, our legal people said that we
17 could not obtain the bigger people. So that that ruled
18 out any consideration of somebody like Chapel or Screen
19 Gems, none of those very big people.

20 We were able to look at, and did look at
21 small publishers, medium-sized publishers, there was a
22 larger number that -- with whom we made contact.

23 Q Can you give us some examples of publishers
24 that you considered acquiring?

25 A Yes. Let me tell you that in some cases, we

1 were on initiative whereas we approached the publisher to
2 see if he was interested in discussing the sale of his
3 catalogue. In other cases, publishers approached us when
4 word got around that we were interested in that field,
5 and without making a distinction as to how -- who approached
6 whom, there were conversations with people like Tommy
7 Velando, who has a marvelous catalogue of Broadway material,
8 Bert Van Heusen, who has a large number of hits that
9 Sinatra had made.

10 A number of Nashville publishers -- we looked
11 at pring houses. We would like very much the Charles
12 Hansen operation. The Bellwin operation, who were just
13 print publishers, but had a few copyrights as well. We
14 looked at songs. To buy songs that had a contemporary
15 flavor, and maybe longevity. "Sunny" is an example.
16 A portion of the -- of Sunny was available for purchase.

17 And we gave that consideration. The Red Evans
18 group, publishers of the Johnny Mathis publishing companies.
19 These are illustrations of the kind of people that we made
20 contact with.

21 Q What was CBS's procedure for looking into
22 potential acquisitions, whether they were publishing
23 companies or not.

24 A Well, there is a regular exercise that one goes
25 through in evaluating the merits of acquisition. And what

1 you do is you obtain financials to make a judgment as to
2 what that company would look like under your ownership.
3 So we would recast the financials, as if we owned that
4 business, and sometimes we found that the profitability
5 would enhance under our ownership, and sometimes, we found
6 that it would not be. It is a regular routine going through.
7 to arrive at a conclusion.

8 Q By financial information, what do you mean?

9 A Well, historical profit and loss accounting
10 balance sheets, longevity of copyrights, renewals, things
11 of that nature, you get all of that, you put it in an
12 Osterizer, and you come out with a judgment. It is for
13 financial analysts, it is just common spade work.

14 Q How many publishers did you receive this kind
15 of detailed financial data from?

16 A I am guessing, about 20, 25, 30, in through there.

17 Q Would CBS ever have considered acquiring any
18 business entity without this information?

19 A Oh, absolutely not. You -- there is just no
20 way to make a judgment. As a matter of fact, I shared with
21 you that I am just shocked to my shoes that given the
22 gravity of the decision you are trying to arrive at here,
23 that you are doing it in the void of hard information, and
24 I would dearly love to help you with that if I could.

25 Q What was the major asset publishers were selling

1 -- considering selling to CBS?

2 A The catalogue of copyrights, unless they were
3 in the print business. And that was another kind of business.

4 Q What would be the major asset for a publisher with
5 a print operation?

6 A Well, in a business, he has inventory, he has
7 distribution routines, it is almost like a separate business
8 from royalty income.

9 Q The publishers that you found, was it common or
10 rare for them to have their own print operations?

11 A It was uncommon; most publishers other than the
12 big ones licensed out their copyrights for print.

13 Q Do publishers ever have a problem setting price
14 on their catalogue when you are considering acquiring them
15 at CBS?

16 A If there was any problem, it was the problem
17 with the prospective purchaser. Of publishers, it is
18 traditional in the publishing field, to use a multiple of
19 gross earnings. The conventional way that people look
20 upon putting a purchase price on an acquisition is times
21 earnings. But in publishing, it is times gross income
22 net of writer royalties; so a publisher would say, "I think
23 my catalog is worth 5, 6, 10, 15 times what they call
24 adjusted gross earnings. It is an unconventional way of
25 using a formula but it is common in the publishing business,

1 and the publishers deal with it and have all the time.

2 MR. COULTER: Adjusted gross income means
3 minus writer's royalties?

4 THE WITNESS: Yes.

5 MR. COULTER: And how do they select the
6 multiple factor?

7 THE WITNESS: It is an arbitrary judgment on
8 their part. They feel that in their view they would need
9 5 times that multiple for them to relinquish ownership.

10 MR. COULTER: Is it related to the length of
11 time of the copyright?

12 THE WITNESS: Yes, it depended -- it was the
13 mixture of copyrights, the length of copyright ownership
14 the contemporary flavor of his copyrights. Some may have
15 been a wasting asset, which we ran into. But it is --
16 we saw, or we were exposed to deals as high as 20 times
17 adjusted gross income. Which is what a publisher figures
18 a catalog is worth.

19 MR. COULTER: Is it appropriate to infer
20 from that that that was a very contemporary and that they
21 still had nearly all the years remaining on the copyright?

22 THE WITNESS: It would be a factor in their
23 evaluations, yes, no question about it. Would be a factor.

24 BY MS. DEAL:

25 Q Does CBS still have all of this financial

1 information it collected from publishers it was considering
2 acquiring?

3 A Wish we had. I would very much like to make
4 a contribution to that. I understand this is an issue of
5 litigation with respect to hard information, but I have to
6 remind you that we are talking about a point in time 12,
7 13 years ago, I edited the files, it is a routine in CBS
8 to purge the dead stuff.

9 So I edited the files myself, and after I had
10 left the files were further edited. We tried very hard
11 to get some of that old information however dated it might
12 have been, it might have been useful to you. And none is
13 available. We just haven't been able to come across any
14 of that.

15 Q Based on your personal first-hand observations
16 of this data, did you reach any conclusions about the
17 profitability in general of publishing companies that CBS
18 was considering acquiring?

19 A It --

20 MR. COULTER: Madam Chairman, I think it has to be
21 pointed out that you are talking about data at least 13 years
22 old.

23 MS. DEAL: It may be old data, but it is data
24 and it is based on Mr. Kavan's detailed observations. I don't
25 think any more recent data that I know of has been submitted.

1 BY MS. DEAL:

2 Q Go ahead.

3 A To answer your question, it re-affirmed what we
4 had already come to know, that the profitability of
5 publishing is very attractive. We saw tax earnings as high
6 as 40 per cent. Now, that is uncommon.

7 CHAIRMAN BURG: As high as what?

8 THE WITNESS: 40 per cent. Pretax earnings.

9 That is a very handsome profit ratio. We like
10 the publishing field. We want very much to enhance the
11 growth of our own operations through the acquisition of
12 good catalogue. There were two -- I might point out,
13 there were 2 movements made, and neither one in which I
14 was involved, one was consummated after I moved away from
15 this particular field, and there was a small purchase before
16 I got into it. Terry Gilkinson's publishing company was
17 purchased by CBS, and then later somewhere along the mid-
18 seventies, Tuna Fish, which is a Laura Nyro catalog of
19 copyrights, was purchased. Good business, we like it.

20 BY MS. DEAL:

21 Q Again, based on your personal first hand
22 observations of the data, did you reach -- did you also
23 reach any conclusions about the capital investment needed
24 to publish?

25 A Well, absent the purchase price, which you want

1 to emphasize, there is very little investment beyond that.
2 There is a minimal administration expense. There is little
3 capital expense required.

4 Q Finally, did you reach any conclusions about the
5 riskiness of publishing during your experience of studying
6 acquisitions?

7 A The longevity of a copyright minimizes any
8 risk. Risk is related to profit. You can afford high
9 risk if there is high profit inherent in the business.
10 In our view of the publishing field, these two don't work
11 in tandem. There are a great deal of risks in owning a
12 catalog of copyrights. It -- the world hasn't stopped
13 by some event from outer space.

14 It is not like going to the marketplace with
15 an Edsel and it is all over. Copyrights have a lot of
16 sock to them over a long period of time.

17 Q That concludes my questioning. Thank you.

18 CHAIRMAN BURG: Let's recess.

19 (Whereupon, a recess was taken.)
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CHAIRMAN BURG: Commissioner Brennan?

COMMISSIONER BRENNAN: I pass.

CHAIRMAN BURG: Commissioner Coulter?

COMMISSIONER COULTER: Since the development of the LP, what do you think was the technological development that kept the price down?

THE WITNESS: Since the development of the LP?

COMMISSIONER COULTER: Yes, between, say, that introduction, whenever it was --

THE WITNESS: I would say first manufacturing economies.

COMMISSIONER COULTER: Manufacturing economies?

THE WITNESS: Economies, yes, yes.

COMMISSIONER COULTER: Between 1955 and 1976? Or '74?

THE WITNESS: Volume obviously, manufacturing economies.

COMMISSIONER COULTER: Manufacturing economies being related to volume?

THE WITNESS: Yes, yes. And also creative improvement in terms of the manufacturing of records. The process has been refined to where it's a very slick assembly line process.

COMMISSIONER COULTER: Given the inflation as it concerns your basic raw materials and the fact that over the last four or five years prices have risen given the national inflation, do you think that you will be able to sustain that level

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of keeping the price down through manufacturing economies?

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THE WITNESS: I don't know that I'm qualified to answer that. Please note that I've been away for two years now so that the drama of the last inflationary curve is something that I'm not that well acquainted with with respect to the record industry.

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I know it's the fervent hope, obviously, to contain prices as much as possible. Lower prices mean more volume. They work hand in hand.

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COMMISSIONER COULTER: You're not prepared to make any statement, though, about that vis-a-vis --

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THE WITNESS: I just don't know, Commissioner, no, I just don't know.

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COMMISSIONER COULTER: Just to clarify the point. On your chart for 1958, I think you showed sales of of 600 million units?

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THE WITNESS: It's just a little less than that, but, yeah, that was the high bracket.

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COMMISSIONER COULTER: That's all right. You don't need to bring it up again. We had testimony several weeks ago to the effect that volume, I think it was 1979, both records and tapes were 600 million.

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Is there some discrepancy?

THE WITNESS: I'm sorry. \$600 million?

COMMISSIONER COULTER: No. 600 million units.

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THE WITNESS: I'm talking dollars.

COMMISSIONER COULTER: Oh, excuse me, I'm sorry. I assume that although you've been out of the business for two years you're familiar with the singer-songwriter control publisher concept?

THE WITNESS: I'm generally familiar with it, yes.

COMMISSIONER COULTER: Do you feel that the control publisher by the singer-songwriter is in a different category than the publishers you're referring to that you were contemplating purchasing?

THE WITNESS: In what way?

COMMISSIONER COULTER: When it's the same person, the songwriter, the publisher and the singer are all the same person or same group.

THE WITNESS: I understand that. Different in what way? The way he runs his operation or his objectives? I know that a publisher who doesn't have --

COMMISSIONER COULTER: Can they be bought? Can you buy one?

THE WITNESS: We looked at some.

COMMISSIONER COULTER: A control publisher? A singer-songwriter publisher?

THE WITNESS: Yes, yes. There were some that were around that time.

MS. DEAL: Commissioner Coulter, may I interject?

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Are you referring to the distinction between, for example, the extent of activities, the active versus the passive publisher?

COMMISSIONER COULTER: Certainly. I mean, to the extent that I think a control publisher would be considered a passive publisher.

MS. DEAL: I believe we spoke about that yesterday, about the distinction that you found when you went through the data.

THE WITNESS: Yes. There are clearly two different approaches to publishing. I, for instance, would rather call some of them copyright owners rather than publishers.

COMMISSIONER COULTER: Isn't that generally what a control publisher is?

THE WITNESS: I guess so, yes. If that's the lingo, I support that.

COMMISSIONER COULTER: And you could buy one, though?

THE WITNESS: Oh, one might be available for sale, yes, sure.

COMMISSIONER COULTER: What kind of profit would they give you? Because I think internally frequently they have a split of 75 percent, 25 percent or 90-10. How would they give you the profit?

THE WITNESS: Well, they would arrive at some valuation for releasing their equity in their catalogue and it could

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be anything. It could be anything. It depends upon the nature of the copyrights. I just can't deal with that specifically because every deal is different.

COMMISSIONER COULTER: Why would they want to sell? I'm trying to understand whether this is a theoretical concept --

THE WITNESS: They might want to diversify their assets which is one of the common motivations for somebody that has an asset. He wants to convert it to cash and use it for some other reason, whatever.

Somebody might want the investment quality. There are people who buy copyrights for investments who are not really publishers. There are attorneys and there are accountants who do that because they're attracted to the investment quality of owning copyrights.

COMMISSIONER COULTER: I understand the concept but if you take a songwriter or group, say, like Pink Floyd and obviously they're writing their songs and performing their songs and they are controlling their publisher, in other words, they're controlling all the rights.

THE WITNESS: Yes.

COMMISSIONER COULTER: If they sold you the publishing aspect of themselves, doesn't that entail them selling to you a certain portion of the copyright in everything they do?

THE WITNESS: It could, yes.

COMMISSIONER COULTER: And they're willing to do that?

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2 THE WITNESS: Well, it's a hypothetical question. I
3 don't know that they would be willing but there are people, I
4 think, who would talk with you seriously about selling their
5 copyrights, yes. They would retain their writers' earnings and
6 they would relinquish the other earnings that would tradition-
7 ally fall to, let's say, the publishers' equity.

8 COMMISSIONER COULTER: Okay. Well, I'm trying to back
9 away from this being hypothetical at all. There have been
10 singer-songwriter control publishers who have sold the pub-
11 lishing part of their operation to your knowledge?

12 THE WITNESS: I'm not sure. You might characterize --
13 an acquisition we made may be generally with that flavor
14 because Tuna Fish Music was essentially a catalogue of Laura
15 Nero copyrights who was a performer and a writer and CBS
16 Records did make that purchase somewhere along in the mid '70's.

17 COMMISSIONER COULTER: That's a woman or a man?

18 THE WITNESS: It's a female, yes.

19 COMMISSIONER COULTER: So she is a control publisher
20 under those --

21 THE WITNESS: I guess you could characterize it that
22 way, yes.

23 COMMISSIONER COULTER: This is back in the '50's,
24 though, right?

25 THE WITNESS: No, no, no. This was in the '70's.

COMMISSIONER COULTER: And she sold you the publishing

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1 half of that, part of that?

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3 THE WITNESS: I don't know what share. I was not in-
4 volved in the consummation of that, you know, in its finality
5 but we purchased the catalogue from her, yes. But that catalogue
6 was a joint ownership between, I think, Laura Nero and her
7 manager, David Geffin, at that time.

8 COMMISSIONER COULTER: Would you, though, in broad
9 terms make a distinction between a control publisher by the
10 singer-songwriter and those that like the company owned by CBS?

11 THE WITNESS: That is a secondary consideration.
12 Your primary interest is the catalogue of copyrights. That's
13 the primary interest and how it might structured is secondary.
14 That may affect the nature of the deal but your motivation is,
15 you know, are these copyrights for purchase better than those
16 copyrights for purchase? You make those kinds of judgments.
17 Can you make a better deal here than you can here?

18 COMMISSIONER COULTER: I didn't quite mean that. I
19 mean, would you -- I'll say it this way. The traditional pub-
20 lisher like Chappell or like Blackwood are bought and sold on --

21 THE WITNESS: Yes, have been.

22 COMMISSIONER COULTER: In a way that you're familiar
23 with?

24 THE WITNESS: Generally, yes.

25 COMMISSIONER COULTER: Did I understand correctly
from you that -- am I correct in interpreting from what you

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1 said that a singer-songwriter control publisher is not
2 generally bought and sold to the degree or even nearly the
3 way the regular traditional publishing company is?
4

5 THE WITNESS: I'm not sure. I don't know how I can
6 address that with any specificity. The singer-songwriter thing
7 was more of a latter day flourishment than at the time I was
8 really involved.

9 COMMISSIONER COULTER: Two years ago?

10 THE WITNESS: No, no. It's not two years ago that --
11 which was the last time I dealt with this. It was 12 years ago
12 almost because I stepped away from this in about 1970, '71. I
13 was involved subsequent to that with quadrophonic sound, with
14 videodisc and those developments.

15 We had a licensing program. We had some patents that
16 we felt we could market commercially. So I had at that point
17 in time nothing whatever to do with publishing. The dialogue
18 I'm extending to you has to do with late '60's, 1970, '71 --

19 COMMISSIONER COULTER: Before the real development of
20 this phenonomen?

21 THE WITNESS: Basically, yes.

22 COMMISSIONER COULTER: But to the extent that you
23 are familiar with the industry, would you say since you're not
24 prepared to state that you don't know whether they are sold in
25 the same way and with the same frequency the traditional pub-
lishing companies are sold, are you prepared to say, though,

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that you think that they are?

THE WITNESS: No, I'm really not up with the trades that are going on within the publishing circle unless they make a big headline in Billboard. I'm not really aware of them.

COMMISSIONER COULTER: Okay. Thank you.

CHAIRMAN BURG: Commissioner James?

COMMISSIONER JAMES: No.

CHAIRMAN BURG: Commissioner Garcia?

COMMISSIONER GARCIA: No.

CHAIRMAN BURG: Mr. Zuckerman?

CROSS EXAMINATION

BY MR. ZUCKERMAN:

Q. Mr. Kavan, just so I make sure that I heard your answer correctly. When Miss Deal asked you whether videodiscs or video cassettes are covered by the compulsory license, what was your answer?

A. No.

Q. And I assume that's because -- although I think this is probably a legal question that under Section 101 of the Copyright Act phono records are described as "material objects in which sounds other than those accompanying a motion picture or other audiovisual work are fixed," et cetera. Is that correct?

A. I'm only relating to you my impression and knowledge that I obtained from others that it is not under the compulsory

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license routine --

CHAIRMAN BURG: A little louder, please.

THE WITNESS: Oh, I'm sorry. The answer is no, as far as I know, no.

BY MR. ZUCKERMAN:

Q. Well, how then does CBS get a license for using music on a video cassette when it wants to use --

A. First of all, it hasn't yet. CBS has not marketed any of the video disc properties. It has recently engaged in a short venture with MGM for the circulation of movies. But to the extent that they have organized some product of the kind that I described that eventually we will have, I don't have any of that yet.

Q. Well, since you testified about the activities of other companies, do you know how the other companies which manufacture and market video cassettes or video discs obtain licenses to use music on those products?

A. I don't know. All I know is what has been reflected in the trade is that some video disc producers have tried to engage publishers in conversation about getting license for their material.

Q. By "conversation," I assume you mean negotiations?

A. Yes.

Q. So then the way that video discs are licensed would be on an individual negotiation between the publisher and the

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company putting out the video disc?

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A. Presumably, yes.

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Q. And that hasn't seemed to pose any problem for the development of the video disc?

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A. I can't address that specifically because I don't know.

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Q. You testified that one of the companies that was developing some of the new technology was Phillipps; is that correct?

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11

A. Yes.

12

Q. Where is Phillipps based?

13

A. Phillipps is based in Eindhoven, The Netherlands. That's the parent headquarters.

14

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Q. Do you know what the mechanical royalty rate is in The Netherlands?

16

A. I do not.

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Q. I can tell you that The Netherlands is one of the countries that subscribes to the so-called BIEM agreement where the mechanical royalty rate is eight percent. Do you know whether -- I know you said you didn't know what the mechanical royalty rate was but have you ever heard anybody refer to the fact that Phillipps has to pay eight percent mechanical royalty in its home country has prevented Phillipps from developing new technology?

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A. I'm in no position to extend on that dialogue with

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you; I just don't know.

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Q. But you have never heard anybody say that that has impeded the development of Phillipps products?

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A. Again, I don't know.

6

Q. You never heard anybody say it? That is my question.

7

A. No.

8

Q. And you know that Phillipps is developing a product, is developing new technology?

9

A. Yes.

10

Q. And they are one of the leaders in the field of new technology?

11

12

A. Presumably, yes.

13

Q. What is the home country of Sony which I believe is another company that you testified was developing new technology?

14

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A. Tokyo.

16

Q. That is in Japan?

17

A. Yes.

18

Q. And do you know that the mechanical royalty rate in Japan under the Jasrac system is 5.4 percent on LP's?

19

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A. I didn't know it until now. I don't know, no.

21

Q. Have you ever heard anybody refer to the level of mechanical royalty rate in Japan as a factor that might impede Sony's ability to engage in new technology?

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A. No, I don't know. These are areas in which I've had no participation, no interest, you might say.

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Q. Well, they are areas that you testified to, aren't they?

A. In the sense of the sex appeal of the development of the product, yes.

Q. And you know which companies are in the forefront of developing a product?

A. Oh, yes, generally, yes.

Q. And Sony is one of those companies?

A. Yes.

Q. And Phillipps is another one of those companies?

A. I might tell you that Sony and CBS have a joint venture operation in Japan. The record operation there is a CBS-Sony company.

Q. Before Sony entered into that arrangement, was Sony principally a record company or an equipment company?

A. There were an equipment company to the best of my knowledge. I don't think they had any record operations before then.

Q. When did the record operation with CBS start?

A. I don't know specifically. I can give you a guess.

Q. Your best estimate.

A. Late '60's.

Q. Have you ever heard of a company called "Discwasher"?

A. Uh-huh.

Q. What is that company?

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A. They provide a cleansing device for the care of records.

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Q. Are they also involved in the development of digital recordings?

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A. I don't know.

7

Q. Have you heard of a company called Devon which I believe is affiliated with Discwasher?

8

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A. Devon?

10

Q. Yes.

11

A. Will you spell that?

12

Q. I believe it's D-e-v-o-n although I'm not certain of the spelling.

13

14

A. I don't know the company, no, but I wouldn't challenge that such a company exists.

15

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Q. Well, let me ask you a broader question. Are all of the companies that are involved in developing this new technology record companies?

17

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A. Record companies and hardware companies because the two are obviously basically related. You must have one with the other.

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Q. Do you expect that the companies which work on developing the digital recordings will patent their inventions?

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A. I don't know what the patent flexibility and opportunity is with respect to digital. Digital is an art, an old art. It goes back to the morse code because that's really what

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it is. It's the Bell Laboratories who did a lot of the spade work for digital as I understand it, you know, back in the '40's, at that time.

Q. Do you know whether CBS has ever asked its legal department to look into whether the digital recordings can be -- or the digital systems can be patented?

A. I don't know that it has ever asked; I don't know.

Q. Do you expect that CBS will patent any of the digital inventions if they can?

A. If they can I'm sure they would but I don't know.

Q. And if they did so, then they would presumably expect to earn income from the licensing of those patents?

A. No. Yes and no. First of all, let me tell you that generally the record industry has made available its technology patent royalty free. For instance, we have a proprietary development with respect to quadrophonic sound, the SQ system which CBS developed.

Now, that was made available royalty free to the industry. LP was made available royalty free to the industry. 45 RPM was made available royalty free to the industry. And I don't know what the portfolio of patent opportunities were like for some of the earlier dimensions but basically the nature of the business was in order to make it grow and prosper, that you induce that by making available these things on a royalty-free basis which is the approach CBS used with respect to

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quadrophonic sound.

Q. Do you expect that the hardware companies that are involved in the development of new technology will make their technology available royalty free to the industry?

A. It would be my hope that they would because it would accelerate the growth of the industry.

Q. You testified also about the profitability of publishers you looked at and I believe you testified that was 13 years ago; is that correct?

A. Thirteen to, let's say, ten years ago, yes.

Q. Let me explore with you how -- you mentioned also that one of the publishers had asked for a figure of 20 times income, 20 times gross earnings.

Do you know what is the basis for arriving at such a figure?

A. It's his judgment of the value to him of that catalogue.

Q. And that would be based, would it not, on an evaluation of what the projected earnings would be?

A. In his judgment.

Q. Well, instead of using the 20 times figure, if you were deciding how much you would pay for a publishing company, how would you determine what price you would pay?

A. We would make our own judgment.

Q. As to what multiple of earnings you would use?

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A. You would do a return on investment projection.

Q. So, in other words, if you are evaluating the income of a publisher that had -- what sort of return on investment would you look for, percentage terms?

A. We have various levels depending upon the risk involved in a company but basically we want to at least earn as much as CBS as a corporation was earning at that time which would probably be about 15, 16 percent. That would be the floor.

Q. Sixteen percent pre-tax return on investment or return on sales?

A. Return on sales. Return on investment I would say we would want at least that or more.

Q. So let's use the 16 percent figure which is, I believe, what you mentioned. So if you wanted a return on investment of 16 percent, how many times the annual earnings of the company would you be willing to pay for the publishing company or any other company you were purchasing --

A. Well, you have to back all the way into it. You have to go -- you have to back into this. You have to go through the gymnastic of doing a return on investment profile and evaluation of the catalogue, an assessment as to how much income those copyrights would generate.

Q. And you get a projection of income through that analysis?

A. Yes. And then --

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1 Q. Once you have the projection of income, how do you
2 then get to the figure of what your return on investment would
3 be?

4 A. Well, then you make a judgment about the residual
5 value of the business, too, and you factor that in and you come
6 down to an ultimate -- I must give you a disclaimer that I'm not
7 of financial origin. I'm a generalist at least --

8 Q. I'm sorry about your disclaimers but I can only
9 question you about things that you testified about and you seem
10 to feel comfortable testifying about, comfortable in terms of
11 speaking, not necessarily comfortable in terms of your back.

12 But ultimately what you would get to is you get a
13 projection of earnings, assuming that you -- assuming in a
14 simple situation where you had a constant level of earnings and
15 you would multiply the earnings in order to get a calculation
16 of your return on investment. Isn't that right?

17 A. Uh-huh.

18 Q. So that if you wanted a return on investment of 16
19 percent, you would use a multiple of approximately six times
20 earnings because then -- for example, supposing a company had
21 annual earnings of \$10,000, if you paid six times the earnings
22 projected at the level of \$10,000 that would come to \$60,000,
23 right?

24 A. Yes.

25 Q. And then in turn your annual earnings of \$10,000

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1 divided by your investment of \$60,000 would equal a 16 percent
2 return on investment; isn't that right? Isn't that basically
3 the way the calculation is done?
4

5 A. Wouldn't you calculate the residual value of that
6 business --

7 Q. I said assuming a simple situation where you have a
8 constant earnings and a constant residual value. Just for the
9 simplicity of calculation.

10 A. For simplicity, okay.

11 Q. So the way you get the six times earnings is by
12 starting with the 16 percent; isn't that right? And the way you
13 get the 16 percent is by starting with the six times earnings?

14 A. Yes.

15 Q. So that the entire exercise is circular?

16 A. Yes.

17 Q. So that the notion that you can put a value or you
18 can calculate a return on investment that CBS might make when it
19 was considering purchasing a publishing company is just a
20 circular method of reasoning that we'll calculate what our
21 investment will be and we'll calculate what the earnings will be
22 and if we then use the right multiple we'll get back to the
23 starting point. Isn't that right?

24 A. Yes.

25 Q. And when you said that one of the publishers was ask-
ing for 20 times earnings as a price, there, dividing that into

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100 you get five percent as a return on investment, right?

A. For simplicity, yes.

Q. I realize that you were leaving out the residual calculation which would have to be factored in. And that also the five percent is how you get the 20 and the 20 times is how you get the five.

A. All right.

Q. So that is also circular. And that was how many years ago, the 20 times figure was given to you?

A. In the late '60's.

Q. And in the late '60's, do you know what the savings bank interest rate was?

A. I don't know.

Q. Let me just put it this way: Was five percent a reasonable return on investment for consumers in the late '60's?

A. I don't know.

Q. Interest rates were lower then than they are now?

A. Yes. It depends in what you invest it.

Q. I understand that. Now, you said also when you were talking about publisher profitability that you wanted to be very cooperative with the Tribunal.

Since you stated that, can I ask you if you know what the return on net assets of CBS Records is?

A. I do not know.

Q. Do you know what the total net assets of CBS Records

4-21

1 are?

2 A. I do not know.

3 Q. Since you want to be cooperative, could you obtain
4 that information and provide it to the Tribunal?

5 A. It's out of my jurisdiction. I am no longer with CBS.
6 I've been away from CBS for a couple of years.

7 Q. Do you know whether the people at CBS want to be
8 cooperative?

9 A. I don't know that I can deal with that question; it's
10 an unfair question.

11 MS. DEAL: I object to that. He already testified --

12 MR. ZUCKERMAN: No further questions, Madam Chairman.

take 4

13 CROSS EXAMINATION

14 BY MR. GREENMAN:

15 Q. Mr. Kavan, I think you can pick up really where Mr.
16 Zuckerman left off. You testified, if I remember rightly, that
17 you had somebody at CBS conduct a search of their files to see
18 whether publisher data was still available; is that right?

19 A. Yes.

20 Q. And CBS would have if the material had been available
21 in the CBS files, it would have been made available to this
22 Tribunal?

23 A. I must tell you that it was depending upon the
24 nature of the receipt of that information. Most of that informa-
25 tion is usually extended to you on a confidential basis so that

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had we had some of that information, we would obviously have had it cleared before we could share it with you.

But if we had it, we wouldn't have gone through that exercise, sure.

Q. And you would have, if it had been given to you -- stike that.

If there had not been such restraints placed on it in the beginning, you would have made it available to the Tribunal?

A. Depending upon the nature of our obtaining the information.

Q. That stayed in the CBS files at the time, right?

A. CBS record files?

Q. Yes.

A. Yes.

Q. And you are no longer associated with CBS Records?

A. No, I'm not.

Q. Who authorized that disclosure at CBS?

A. Who authorized what disclosure?

Q. You say CBS would have made this information available but you, yourself, were not an employee or officer of CBS. Who at CBS made the decision that it would be made available?

A. Other members of CBS's staff.

Q. Who?

A. I spoke with Mr. Dean specifically about that.

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Q. What is his position?

A. He is, I believe, the Executive Vice President of CBS Records. He helped with me in the search for the material.

Q. Anybody else?

A. Not that I know of. He's the only one I had conversations with.

Q. You would not think it wise if somebody or if some corporation that wanted to buy into CBS Records Group from CBS to buy it without detailed financials, would you?

A. Absolutely.

Q. Are you aware that in this proceeding we have asked for that sort of financial information from CBS Records?

A. I know generally --

Q. In order to enlighten the Tribunal and have been refused it by CBS Records.

A. Well, I'm not aware of that, sir, no. I know that this is a point of litigation generally.

Q. Now, you have discussed the research and development efforts of CBS and some other companies in the record industry?

A. Yes.

Q. There are other companies besides CBS, of course, in the domestic record industry?

A. Yes, of course.

Q. We have a list of them that has been supplied to us as RIAA Exhibit A. And they are all involved in this proceeding

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1 or through their association. I would just like to go down and
2 from the top --

3 MS. DEAL: Counsel, can I interject? I think Mr.
4 Kavan made -- before you go into that long list because of Mr.
5 Kavan's back problem and the pending approach of lunch, Mr.
6 Kavan made it very clear to the reporter in the beginning of
7 his statement that he was speaking about research activities
8 by major integrated companies; and in this instance --

9 MR. GREENMAN: Well, I'll cut it short if you stipu-
10 late that most of the companies on this list have conducted no
11 such research efforts.

12 MS. DEAL: I'm sure Mr. Kavan wouldn't have any
13 knowledge if they had or had not.

14 MR. GREENMAN: Will you stipulate?

15 MS. DEAL: No, I will not.

16 BY MR. GREENMAN:

17 Q. Let me show you the list. Why don't you just tell us
18 which of these companies have conducted research and develop-
19 ment efforts on the same scale as you have described today?

20 A. Let's say to some degree rather than the same scale.

21 Q. No, the same scale because that's what I'm interested
22 in. That's the scale that you described today and then you can
23 take the others.

24 A. RCA obviously is a comparable company. Phillipps,
25 the owner of Polygram, is a comparable company. Capitol has made

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marvellous innovative developments in the manufacturing routine. Anybody who is an integrated company, first of all, is the only one who can do it because they house the expertise.

Q. Well, let's talk about that. Has Capitol invested the sort of -- well, the figure you gave, as I recall, was a \$5 million capital investment on a \$20 million gross, the start of the LP.

A. Generally, yes.

Q. Has Capitol made that kind of investment to your knowledge?

A. Not in a new consumer product development. They could have made a major investment in their manufacturing routine of which I'm not aware.

Q. Any others on this list?

A. Again, to restate, anybody who is an integrated record company.

Q. Can you tell us of any others on this list who have done this sort of thing specifically?

A. Who are active? Capitol --

Q. On the scale that you are talking about.

A. I have difficulty dealing with on the scale --

CHAIRMAN BURG: Mr. Greenman, how would he know? Can't we couch this in at least some broader parameters? How would he know?

MR. GREENMAN: Well, we have had this picture

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presented to us, Madam Chairman, and I think quantitatively it is important because that's the way it was put to us and that's why I'd like to see if this was a typical example or an exceptional one.

THE WITNESS: Well, I can identify for you, sir, the --

MR. GREENMAN: Maybe the answer is that he doesn't know and if so, he can say so.

THE WITNESS: I can identify for you the companies who have made some efforts in this development direction either of a consumer product nature or of a manufacturing enhancement nature.

BY MR. GREENMAN:

Q. Can you tell us the extent of their efforts?

A. Unless it has been publicized as RCA has publicized its videodisc commitment, no, I don't. I just don't know that.

Q. Are there any others besides RCA that you know of quantitatively?

A. In terms of having a very heavy bent to research and development, EMI is a company of which Capital is a part that is very much research and development oriented.

Q. You showed us a compact disc. That's the disc that is about four inches across and holds about 60 minutes of music on a side?

A. Yes.

Q. How many popular tunes could be put on that disc?

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A. I don't know that there's an arbitrary playing time length to a popular tune today. It will vary depending upon the artist. Pink Floyd would do one tune on that thing and Andre Kostelanetz, were he alive, might do 20.

Q. On the old three-minute standard you could put 20?

A. I don't know that anybody uses that insight any more of three minutes.

Q. You have discussed the song, "I Believe" which you said was acquired by CBS, the copyright was acquired.

A. Yes.

Q. Was that copyright subsequently transferred to another publisher before the renewal?

A. I don't know, sir.

Q. Was it not transferred to Richmond?

A. My understanding of that is that Richmond supervised the circulation of that song. At the time that CBS had that copyright, it did not have a publishing element within its corporate activity.

Q. And CBS was not able to handle the publishing and promotion of that song at that time?

A. It just wasn't in the business at that point in time. That was a later development.

Q. There was something more to be done than collect the royalties?

A. No. I'm not saying that. CBS just wasn't in the

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publishing business at the time. It owned the copyright.

Q. You said that, as I recall your testimony, that the start of the LP era, using 1948, CBS Records gross revenues were \$20 million a year.

A. Generally, in and around that area, yes.

Q. In the late '40's.

A. Yes.

Q. Do you know what its profitability was at that time?

A. I do not know, sir.

Q. Did I understand you to say that at the time you were looking for publisher acquisitions, CBS Records was earning 15 percent of its gross revenues, its pre-taxed profits before --

A. I said that pre-tax was 15 or 16 percent, is my recollection.

Q. Of revenue?

A. Yes, in that area.

Q. And its revenues since the -- well, since the \$20 million figure in the late '40's have now risen to over a billion dollars a year as the record group. During that time, the consumer price index has gone up, let's say, since 1945 if we're going back that far by a factor of about four.

So that in real terms the revenues have gone up by a factor of somewhere between 10 and 15 since that time.

A. The revenues would have gone up much more than that --

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1 CHAIRMAN BURG: Louder.

2 THE WITNESS: If I said \$20 million in '48 and a
3 billion dollars now, that's 50.
4

5 MR. GREENMAN: You're right. Fifty times it's gone up
6 since then.

7 THE WITNESS: I'm just extending on your dialogue.

8 MR. GREENMAN: Very well. I have no further questions.

9 MS. DEAL: I have two brief questions.

10 CHAIRMAN BURG: Just a moment. I have one quick
11 question. With respect to the LP and the 45, am I correct that
12 initially the 45 was more popular, it took more time for the
13 LP to be accepted or is that erroneous?

14 THE WITNESS: No. I would say it's incorrect, Madam
15 Commissioner. The LP really had the upper hand.

16 CHAIRMAN BURG: From the start?

17 THE WITNESS: I would say so because the 45 RPM
18 albums did not compete with the LP and because CBS was tardy at
19 that point in time of addressing the single record, extension
20 of the LP, by default the 45 moved in and replaced the 78 RPM
21 record.

22 Conjecture says that if CBS had spent some effort in
23 institutionalizing a seven-inch single record, 33 1/3 RPM, that
24 that might have precluded the success of the 45 RPM.

25 CHAIRMAN BURG: So it's the marketplace, really, that
determines that if indeed the manufacturer does everything in

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1 its power to promote and to market the product?

2 THE WITNESS: Yes.

3 CHAIRMAN BURG: You said that the advent of tape made
4 music portable.

5 THE WITNESS: Yes.

6 CHAIRMAN BURG: Just as a person who has been involved
7 in radio for a long time, that's one of the sales points we use
8 constantly in competing for sales with television stations.
9 We thought that radios made music portable.

10 THE WITNESS: Well, personal portability. Music you
11 want when you want it.

12 CHAIRMAN BURG: Thank you. Miss Deal?

13 REDIRECT EXAMINATION

14 BY MS. DEAL:

15 Q. Back to Mr. Zuckerman's questions. Mr. Kavan, is
16 Phillipps, located in The Netherlands, this division we're talk-
17 ing about, a hardware or a software manufacturer?

18 A. Phillipps is a European giant in a lot of businesses
19 nad has -- Siemans and Phillipps have a co-venture which is the
20 Polygram operation, as I understand it. I'm not that familiar
21 with its structure but Polygram is an extension of the Phillipps
22 parent company.

23 Q. What market is Phillipps aiming these video discs
24 for? The Netherlands or the United States?

25 A. The mass market, United States, everything.

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1 Q So the seven percent royalty rate really -- or what-
2 ever it is -- would really not be applicable to Phillipp's
3 decision?

4 MR. ZUCKERMAN: Madam Chairman, as a point, whatever
5 royalty rate would not be applicable to the video discs, that
6 has been established.

7 BY MS. DEAL:

8 Q Mr. Zuckerman talked about publishing companies in
9 this chart here on the board. And you mentioned that it was
10 important to calculate the residual value of the copyrights.
11 Would you just explain that again before we finish?

12 A Well, that's a routine with respect to viewing any
13 acquisition, prospective acquisition. You run out a stream of
14 earnings and at the end of an arbitrary period -- some do it in
15 five-year stretches, some do it in ten -- you arrive at a
16 residual value of that business and you make the calculation.

17 Q Would this be typical in other, for example, service
18 businesses?

19 A Any business.

20 MS. DEAL: Thank you very much.

21 MR. ABRAM: Madam Chairman, before you adjourn, may I
22 make a brief comment? Two comments, really. The first is that
23 we have not despite Mr. James' statement earlier in these pro-
24 ceedings with respect to the applicability of the proceedings
25 of rules of evidence, we have not objected to hearsay but if the

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RIAA continues as they have this morning to put on witnesses who deal largely in hearsay or extensively but who resist cross examination of the facts of the hearsay, we feel that we will have to vary our position because it puts us at a grave disadvantage. That's the point, number one.

Point number two will be a simpler and I think happier point. Madam Chairman and members of the Tribunal, we have had your time and attention now since May the 6th.

The NMPA and the Songwriters have concluded their respective affirmative cases. We have heard on direct and have cross-examined the principal record company executive of the world's largest record company, CBS, and we have also concluded yesterday the cross examination of the chief executive officer of their trade association.

Now, soon we shall hear from the CRI through Mr. David Kiser whom we shall, of course, want to examine in some detail. Otherwise, we believe that the proceedings can move expeditiously. We will on this side of the table listen attentively to the RIAA witnesses who remain and address ourselves selectively to that testimony. If they do not present cumulative testimony and I hope they don't, we shall be very brief indeed.

We have heard extensively from Mr. Yetnikoff who was fully prepared, fully staffed with house counsel, outside counsel, and a full staff and a respected person in the industry.

Now, our purpose is to reduce the time and expense,

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the expense, which is really very burdensome. It certainly burdens us and I'm sure it burdens other parties too and certainly the time is a great burden to the Tribunal.

I say all of this because we believe that the general issue is well developed now from the examination and the cross examination of the best staff witnesses of the most comprehensive organizations, both entrepreneurial and trade association-wise.

We would like to cooperate in every way possible to bring these proceedings to a conclusion within a reasonable period of time.

CHAIRMAN BURG: Mr. Abram, with respect to your second point the Tribunal is delighted that you have followed its example because we made a similar decision about a week ago that we would be expeditious and selective in our questioning of witnesses.

One housekeeping matter: On Page 166 of yesterday's transcript, my remarks were attributed to Commissioner Garcia. So if you will make that correction, there are only two instances.

MR. ABRAM: There are a few other corrections but I won't burden you, ma'am.

COMMISSIONER JAMES: Madam Chairman, along that same point, I think maybe Mr. Fitzpatrick might like to comment on whether or not some of the future witnesses are going to be

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1 giving cumulative testimony and that maybe a re-evaluation of
2 the people that you have scheduled, some can be eliminated in
3 the interests of time.

4 MR. FITZPATRICK: We are as mindful of the patience
5 of the Tribunal as everyone else in this room is and Mr.
6 Abram is.

7 There are a number of people that we are going to be
8 calling that are going to speak to aspects of the case and the
9 criteria that have not been heard from as yet. We as well are
10 going to tailor our case. We hope to finish as promptly as
11 possible. We know it is not to our advantage or to anyone's
12 advantage to try our-opponents' or the Tribunal's patience
13 with cumulative testimony.

14 There are, however, small record manufacturers that
15 have a particular perspective. There are questions of licensing
16 that have not been discussed in any detail, licensing experts.
17 We have a witness on international who will come on later today.

18 We are quite mindful of the Tribunal's schedule and
19 our own needs. We will be trying to cut back as well and as we
20 get later into this month, we hope to finish this month. It
21 well might be possible for us to eliminate some of our witnesses
22 because some of the points have been covered.

23 But we are certainly on sync with the Tribunal and
24 our friends to the left.

25 MR. ABRAM: I didn't hear Jim. What did you say about

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1 the end of the month? You said that you might be finished that
2 early?

3 MR. FITZPATRICK: We are going to do our very best to
4 wind up at the end of this month and indeed to accomplish that
5 goal, I think that we might maybe ask to go a little later in
6 the afternoon -- and if we could accommodate everyone's
7 schedule maybe to have a carry-over session on Friday morning.
8 We'll have to see whether that meets your schedule but we are
9 most anxious to get our case off and on before you in the month
10 of July if that's at all possible.

11 CHAIRMAN BURG: And as I understood, you, Mr. Abram,
12 if the evidence or the witness gives cumulative evidence you
13 reserve the right to get into --

14 MR. ABRAM: Oh, yes, I'm not restricting the right.
15 I'm just stating an intention.

16 CHAIRMAN BURG: We will adjourn until 2 o'clock.
17 Thank you very much, Mr. Kavan.

18 (The hearing adjourned at 12:30 for a luncheon
19 recess to resume at 2 o'clock this same day.)

end take

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A F T E R N O O N S E S S I O N

2:10 p.m.

CHAIRMAN BURG: We'll come to order.

Yes, Mr. Greenman?

MR. GREENMAN: Before we resume with the next witness, Madam Chairman, I wanted to take care of one matter, if we could. There are a couple of open items concerning data that we have requested, and as to which we have been promised responses, in one case, a prompt response. One of them is the aggregate data to the Cambridge Research Institute questionnaires, and the second is some CBS Records artists' contracts.

Two weeks ago, we were told that in some form, such contracts -- some such contracts would be provided, and we thought perhaps this morning's witness might provide something. But I wondered if we could have a response from the record industry as to what will be done on those two items and when.

MR. FITZPATRICK: Yes. In connection with the latter request, as far as the CBS contracts, it seems to me that the appropriate witness was not the technical witness this morning, and the witness that would be much more appropriate to provide what will be provided, is Mr. Fox or Mr. Dean, who will be coming on after Mr. Kiser. I'm not sure both of them will be coming on, but one or another of

1 those people, our senior corporate executives, they would
2 be the appropriate -- that would be the appropriate time to
3 supply -- the mode to supply that response.

4 As far as the CRI data, we have been reassembling
5 some of that data, and it's my anticipation that we can
6 have that information for you at an early point next week.
7 We do not have it now.

8 Some adjustments were made on the basis of some
9 additional information that came to hand, and that is now
10 being factored into the data, and we'll have that for you at
11 some point early next week. It is not available today.
12 We will have it for you as soon as we can, and I think it
13 would clearly be prior to the time that the CRI witnesses
14 come on. They're not going to come on at all next week.
15 They won't come on until the following week.

16 MR. ZUCKERMAN: May we also ask that the contracts
17 that were requested be provided to the parties and to the
18 Tribunal some time in advance of the witnesses' testimony,
19 so that we can have a fuller examination?

20 MR. FITZPATRICK: We'll certainly attempt to do
21 that. I think that what I have to do is go back and read
22 the exchange that was had between counsel and the CBS
23 witnesses, in terms of exactly what form the presentation
24 is going to be made, and we will endeavor to do our best to
25 get that information to you before the time that the CBS

1 witness comes on.

2 MR. ZUCKERMAN: Thank you.

3 COMMISSIONER JAMES: I have a question. I'm a
4 little confused. Did I understand you to say, in response
5 to the composers' request, that it is your intention to
6 present -- the record industry, to present some contracts?

7 MR. FITZPATRICK: I think that the request came
8 to CBS, and that CBS, as I recall, had taken under advise-
9 ment, a way to provide information on contracts that did
10 not reveal confidential information.

11 As I understand the songwriters' request, it is
12 not to be looking willy-nilly at contracts. I don't think
13 that they have any interest in contracts generally. They
14 have some concern, as they have expressed, whether the
15 witnesses that have testified under oath -- that the statu-
16 tory rate in artists' contracts, as far as mechanical,
17 shows up in contacts, and --

18 MR. GREENMAN: No, if we're going to talk about
19 what the composers' request is, let me make it clear.
20 We asked for a representative sample of the entire contract,
21 because it is an obvious fact that a provision in one
22 clause of a contract may modify a provision in another, and
23 you cannot tell the meaning of the contract until you have
24 the entire document in front of you.

25 And we ask that all identifying details from

1 the contracts be removed, but we ask that a representative
2 group, preferably a group of consecutive contracts in the
3 most recent year, preferably for the whole year, but for a
4 smaller period if there was some reason to have a lesser
5 group, be supplied. And we are interested in those provi-
6 sions of the contracts which are related to the summaries
7 that the secondhand report -- thirdhand reports of them,
8 that we have had in various aspects of the testimony here,
9 both as to the artists' royalties and mechanical royalties,
10 the controlled composition provisions, and so forth, and
11 the entire interrelationship of these.

12 That request, in that form, the record industry
13 refuses to supply. The request was made both of CBS and
14 of Warner, if you will remember, Madam Chairman. Warner
15 gave us a flat refusal. CBS refused, but said they would do
16 something else. Mr. Cohen was very unspecific as to what
17 the other thing would be, and I'm trying to find out both
18 what it will be, and secondly when it will be.

19 MR. FITZPATRICK: Well, I've told you, I don't
20 know when it will be. And when it will be, I said it
21 will be in conjunction with Fox's testimony, and I have Mr.
22 Zuckerman's request that whatever it is be made available
23 to all parties at a decent interval prior thereto, so that
24 someone could take a look at those materials before they
25 start the cross-examination.

1 COMMISSIONER JAMES: Well, I think that deals
2 with what Commissioner Brennan had indicated to one of
3 your witnesses -- counsel, that we go into executive
4 session, and would that alter his negative attitude. And
5 he said he was going to take that under advisement. That's
6 why I specifically wanted him to clear it up.

7 Now, what specifically are you endeavoring to
8 bring before this Tribunal, in answer to this request
9 from the other side?

10 MR. FITZPATRICK: What CBS is endeavoring to do
11 is to determine whether they can bring the information the
12 composers want before the Tribunal, to give all parties
13 an opportunity to take a look at the contract terms in a way
14 that is not going to compromise the confidentiality of
15 these contracts.

16 From our point of view, there is a most serious
17 concern about the competitive implications of contracts
18 and their terms getting out. It is a matter not only of the
19 names being blotted out, but if a particular company has
20 a standard line, in terms of all their contract terms,
21 they consider that confidential information. We are attempt-
22 ing to be forthcoming to the Tribunal and our colleagues
23 here, to give them information, to test the propositions
24 that have been advanced here, without compromising the
25 confidential information.

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1 COMMISSIONER JAMES: I understand, but you're
2 still not directing the question I'm trying to get across.
3 Let me see if you understand it. I'm saying that the
4 counsel indicated, in response to Commissioner Brennan's
5 request, would it alter his position if we went into execu-
6 tive session, which our rules provide for, and where there
7 is no record, no press, just the counsel, I would assume,
8 and the Tribunal, to review --

9 MR. FITZPATRICK: Your records provide for a
10 transcript, which transcript could be made available at the
11 end of a year, should the Tribunal determine that it is no
12 longer confidential.

13 I must say that the idea of confidentiality
14 has some attraction, but the rules themselves --

15 MR. ZUCKERMAN: Was the rule number on that?

16 COMMISSIONER JAMES: I have to disagree with
17 you, Mr. Fitzpatrick. He's talking about a closed session.

18 COMMISSIONER BRENNAN: No, but, Commissioner, I
19 think Mr. Fitzpatrick is referring to the requirements
20 of the Information Act, which are to some extent followed in
21 our rules.

22 COMMISSIONER JAMES: They are.

23 COMMISSIONER BRENNAN: And when I was Chairman,
24 I believe I had to write Senator Chiles of Florida a letter
25 in which I described our procedures, whereby we reviewed

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1 transcripts of executive session, and what were our proce-
2 dures for making those documents --

3 COMMISSIONER JAMES: Executive session, as opposed
4 to a closed session?

5 COMMISSIONER BRENNAN: Yes, sir.

6 MR. FITZPATRICK: All I'm suggesting is, we are
7 essentially, in the first instance -- this matter is
8 before CBS. I had not, to be honest with you, anticipated
9 being questioned between the time, now, and the time that
10 Fox comes on.

11 I will endeavor to determine the status of
12 their deliberations on this matter, and report back to you,
13 if that's useful. We had been looking toward the Fox
14 testimony as the next time this issue was going to come up,
15 but I will endeavor to know where they are in their delibera-
16 tions.

17 CHAIRMAN BURG: Mr. Greenman?

18 MR. GREENMAN: May I come back, then, to the first
19 point, which is the aggregated Cambridge Research Institute
20 data, which I now ask, in the first place, which data will
21 be made available, and which day, if possible, on which
22 it will be made available, because time is again running
23 short.

24 If it's made available next week, there will be
25 only the weekend before Dr. Kiser comes on.

1 MR. FITZPATRICK: I would certainly hope to have
2 it for you, so you have more than just the weekend, if we
3 can get it to you early in the week, next week.

4 MR. GREENMAN: Will it be the aggregate responses
5 from all these questionnaire line items?

6 MR. FITZPATRICK: Yes, that's what we're aiming
7 for, is the aggregates, and we want to present it in a way
8 that both preserves confidentiality and is meaningful.

9 MR. GREENMAN: But will it be for all the ques-
10 tions on the questionnaires?

11 MR. FITZPATRICK: In some instances, not all the
12 companies answered all the questions on all the question-
13 naires, and we're trying to determine what is going to be a
14 way to present the data in a meaningful form, that can then
15 be gone into on direct examination, to describe the
16 process of collecting data and the development of aggregate
17 figures, and the projections that are set forth in the CRI
18 report.

19 MR. GREENMAN: Well, lest there be any question
20 that the Commission, as I understand the Tribunal's rules,
21 calls for the aggregate data, and what I have asked for is
22 simply the totals of the responses that you have, line by
23 line, on the questionnaires, which is simply a matter of
24 addition, or averaging, in the case of that break-even study,
25 and you can simply indicate if there are not all 14 responses

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1 however many responses there are to that particular item.

2 MR. FITZPATRICK: Right, I understand.

3 CHAIRMAN BURG: Mr. Abram, did you have a question?

4 MR. ABRAM: I just wanted to inquire, through
5 the Chair, to Mr. Fitzpatrick, because I shall be gone
6 next week, and I shall also, while traveling, try to prepare
7 myself for the examination of Dr. Kiser.

8 It will make a great deal of difference to me,
9 of course, if we are going to be furnished amongst the
10 data that he intends to furnish, the net equity of the various
11 record companies.

12 Now, I might point out there could be nothing
13 confidential, in the normal sense, about that, such as an
14 artist's contract, for whom people are competing, because
15 the internal net equity, which is published, of the Fortune
16 500 companies annually, and I see no reason why that can't
17 be furnished, and I wonder if it his intention to furnish
18 that amongst the materials.

19 MR. FITZPATRICK: My intention, in that connec-
20 tion, is not to furnish that material. That was not an
21 aggregation that was set forth in CRI Exhibit 1. My further
22 intention, however, is, on direct, to describe, as I had
23 earlier indicated some weeks ago to the Tribunal, that we
24 are going to explain the answers that we got on the ques-
25 tionnaire, as it related to net equity and return on

1 investment, and the difficulties that our economists had
2 in terms of having sufficient data to draw a meaningful
3 set of conclusions in terms of return on equity.

4 MR. ABRAM: Well, I don't want to prolong this,
5 but, for example, if Mr. Dean or Mr. Fox are on the stand,
6 and I guess one or the other or both will be, and claiming
7 impoverishment, or whatever they're claiming, I would
8 think that, if they had responded to the questionnaire,
9 which they didn't have to put out, with respect to the net
10 equity of the company for whom he is speaking, and if the
11 Tribunal has already requested, under its rules, that he
12 turn over that material, I would like to know whether it's
13 going to be turned over.

14 MR. FITZPATRICK: I think that -- you see, you
15 don't have this problem, since you haven't turned over
16 any data.

17 MR. ABRAM: Well, I'm not -- I'm just --

18 MR. FITZPATRICK: Let me finish. I have been on
19 the record consistently that the aggregate data is the
20 data that we are furnishing to the Tribunal, and that indi-
21 vidual company responses contain confidential information,
22 and that aggregate data will be gone into, I'm certain,
23 in terms of the Tribunal's examination, in terms of my
24 examination, in terms of your examination, in great detail,
25 and that to provide individual company data, except to the

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1 extent that the company makes a decision that it can provide
2 that data without competitive harm, is not a judgment that
3 I, as counsel to the record industry, can make, nor can Mr.
4 Kiser, who secured these data with assurances of confiden-
5 tiality.

6 I think that, whatever you feel about Mr. Dean
7 or Mr. Fox coming in to testify, that's how you feel -- I'm
8 sure you'll argue that point to the Tribunal when the time
9 comes. Our view is quite consistent and quite clear, and
10 Morris, I wish you were in the same situation, having
11 provided some aggregate data, so we could needle you about
12 turning over data from your individual publisher companies.

13 We have indicated, through CBS -- or CBS, at least,
14 has indicated that, on the publisher side, they are perfectly
15 willing to have April Blackwood participate -- their publish-
16 ing arm, in an aggregate industry study coming from your
17 side of the street.

18 We have done that, coming from our side of the
19 street. I think the record is absolutely and abundantly
20 clear as to where we are on that point.

21 MR. ABRAM: The answer is no, I take it.

22 MR. FITZPATRICK: The answer is -- I don't know,
23 we'll see what Mr. Dean -- what CBS decides that they want
24 to do with their confidential information that is not
25 aggregated.

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1 CHAIRMAN BURG: Do you have a witness, Mr.
2 Fitzpatrick?

3 MR. FITZPATRICK: Yes.

4 COMMISSIONER COULTER: Excuse me, if I may just
5 make a --

6 MR. FITZPATRICK: Yes.

7 COMMISSIONER COULTER: The issue of a closed
8 meeting, of the transcripts, was brought up. I believe all
9 that's -- we have the option of, rather than having a tran-
10 script, which has to be retained, of having simply detailed
11 minutes. I believe that is an option.

12 MR. FITZPATRICK: That's right. Now, I must
13 say that we are all plowing a fresh field here.

14 COMMISSIONER COULTER: I understand.

15 MR. FITZPATRICK: No one is really quite sure
16 what the terms of confidentiality are, and there is a further
17 complicating factor, in terms of sanctions, should there be
18 a violation of the confidentiality. In many instances,
19 for example, in the Australian proceeding, where there
20 was a confidentiality proposal, or order imposed, a lawyer
21 would be in contempt, and could get himself in very hot
22 water, if he were to intentionally violate the confidentiality
23 regulation imposition.

24 I must say to you, as a lawyer, I am somewhat
25 uninformed as to the implications of a person wittingly

1 violating a confidentiality order, under the rules of this
2 Tribunal, where there is neither subpoena power nor contempt
3 power. That is, it is an honest question in my mind, and it
4 has been one that has arisen, and would have to be resolved,
5 if one were to move forward to a closed session.

6 MR. SHERMAN: If I might just make a point, and
7 I hope this is taken in the right spirit -- but you have
8 to appreciate CBS's position on this thing. If the attorneys
9 for the music publishers and the composers are to be present
10 in a closed session, well, the respected law firm represent-
11 ing counsel is long-time counsel to Warner Communications,
12 which is CBS's main rival, main competitive rival.

13 I don't for a moment think that Mr. Abram or
14 Mr. Zuckerman or anybody else would disclose the confiden-
15 tial information, but information seen is information
16 recalled, and CBS has just cause to worry about the disclo-
17 sure of confidential information to counsel for a competitive
18 company.

19 MR. ABRAM: But net equity, Madam Chairman,
20 is not something which is considered confidential by all of
21 this list of 514.

22 MR. SHERMAN: That's a consolidated company, not
23 a division, and I bet that you will not find divisional
24 allocations there by the publishing companies, or by the
25 record companies.

1 MR. ABRAM: I will not find any record company,
2 that's right.

3 COMMISSIONER COULTER: Mr. Fitzpatrick, since
4 Mr. Kiser isn't going to be here for another couple of
5 weeks, when you're speaking with CRI next week, if you could
6 just find out -- I don't want to burden you, but just ask
7 which line on Exhibit 1 has recouped recording costs?

8 MR. FITZPATRICK: I have asked them that twice.
9 Each time you have flagged that, I have passed along your
10 interest in that matter.

11 MR. ZUCKERMAN: Madam Chairman, I don't want to
12 prolong this, but let me --

13 CHAIRMAN BURG: Whenever anyone says, "I don't
14 want to prolong this," it has been my experience, Mr.
15 Zuckerman, that they do. But please continue.

16 (Laughter.)

17 MR. ZUCKERMAN: Well, I will withdraw that state-
18 ment, then.

19 Responding to Mr. Fitzpatrick's comment, I know
20 that, whatever the rules of the Tribunal are, and whatever
21 the contempt powers of the Tribunal are, that under the Code
22 of Professional Ethics and the disciplinary rules, as it's
23 applied in the State of New York, where I am a member of
24 the bar, that violation of a confidentiality order by an
25 administrative agency, whether or not the agency had the power

1 to hold an attorney in contempt, could cause the commence-
2 ment of disciplinary proceedings against the lawyer. And
3 I just don't think that that's a problem.

4 MR. SHERMAN: It certainly isn't a problem for
5 you.

6 CHAIRMAN BURG: Does anyone else not wish to pro-
7 long this? In that case, we will -- you do have a witness?

8 MR. FITZPATRICK: I do have a witness.

9 CHAIRMAN BURG: Would you bring the witness for-
10 ward, please?

11 MR. FITZPATRICK: Yes, Mr. Thomas, please.
12 Whereupon,

13 IAN D. THOMAS
14 was called as a witness and, after being first duly sworn,
15 was examined and testified, as follows:

16 DIRECT EXAMINATION

17 BY MR. FITZPATRICK:

18 Q Mr. Thomas, would you give your full name, please,
19 and describe your background and position to the Tribunal?

20 A My name is Ian David Thomas. I am Deputy
21 Director General of IFPI, which is the International Federa-
22 tion of Producers of Phonograms and Videograms, and IFPI
23 has its secretariat and headquarters in London, England.

24 Q Would you give us some general description of
25 IFPI, please?

1 A. IFPI is a federation, which was founded in 1933,
2 composed of, as its name implies, or as its subsidiary
3 title implies, producers of phonograms and videograms. It
4 was originally called the International Federation of the
5 Phonographic Industry, which is where the initials come from.
6 But, with the advent of videograms, that name was changed.

7 CHAIRMAN BURG: Mr. Thomas, would you keep your
8 voice up?

9 THE WITNESS: Certainly, ma'am.

10 CHAIRMAN BURG: Thank you.

11 THE WITNESS: It has about 600 members in some-
12 thing like 60 countries, and it has affiliation agreements
13 with the Recording Industry Association of America, with
14 the Latin American Federation of Record Producers, and with
15 the Australian Record Industry Association.

16 BY MR. FITZPATRICK:

17 Q. How long have you been connected with IFPI,
18 please?

19 A. I have been with IFPI since 1968, and I have been
20 in my present position as Deputy Director General since 1975.

21 Q. And you are a barrister?

22 A. I am a barrister, yes.

23 Q. Although you are not -- you haven't practiced --

24 A. No. As it happens, I have been engaged in
25 employed legal work since I qualified.

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1 Q Could you describe for the Tribunal the role that
2 IFPI plays in negotiations with publishers in Europe, and
3 how you personally have been involved in those negotiations?

4 A Yes. As it happens, IFPI came into existence
5 shortly after BIEM was founded. BIEM, which is B-I-E-M,
6 has been referred to in this Tribunal before, I think -- was
7 founded in 1929 as an international licensing body.

8 IFPI came into being as a counter to that
9 development, on behalf of the record industry, partly in
10 order to negotiate collectively on behalf of record producers.

11 Q And have you been involved in those collective
12 negotiations?

13 A Yes, sir. As it happens, since I have been with
14 IFPI, I have been involved in all of the negotiations
15 since 1969.

16 Q And beyond that, do you have responsibilities,
17 on a day to day basis, for advising your members on relation-
18 ships -- your associations on relationships between record
19 companies and publishers?

20 A Yes, I have other responsibilities, but my job
21 includes looking after relations with authors, composers,
22 and societies, and publishers.

23 Q And you would be the one that would be consulted
24 in IFPI to discuss copyright matters, and relations with
25 publishers?

1 A. That is so. As it happens, I am the Chairman of
2 the Copyright Committee as well, which is another reason
3 why people might perhaps come to me.

4 Q. Have you been involved in the current BIEM nego-
5 tiations?

6 A. Yes, I have. There have been three negotiating
7 meetings, and I have been present at all of them.

8 Q. Well, now, at the outset here -- we'll be returning
9 to these matters in more detail, but could you summarize
10 your observations, your view, of the current status of these
11 BIEM negotiations?

12 A. Well, the current state of BIEM negotiations
13 gives rise to a certain amount of concern to IFPI and its
14 members in Europe, because we are in fact negotiating for a
15 new contract, which should have come into effect on the
16 first of January of this year.

17 We began negotiations last year, and as I've
18 said, we have had three meetings with BIEM. These are full-
19 scale meetings, where there are upwards of 12 people on
20 either side, from all countries in Europe involved, and each
21 of those meetings has been inconclusive, and we are now into
22 the second half of 1980, and we are in no way approaching
23 even the hint of an agreement.

24 Q. And the moment of truth, in terms of an agreement,
25 comes at the end of this year, is that correct?

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1 A. Well, there have been two extensions. There was
2 an extension made when it was clear there would be no con-
3 tract at the end of 1979, and there was an extension made at
4 the more recent meeting, held in Rome last month, which takes
5 us to the end of this year.

6 I do not think that IFPI, at least speaking for
7 the record industry side, would be happy to have a further
8 extension, because one can go on extending indefinitely, and
9 never get anywhere.

10 Q. Now, in terms of the issues that have seemed to
11 be precipitating this concern at the negotiating table,
12 this lack of agreement, what are the major issues that you
13 find separate you?

14 A. Well, first and foremost, the issue which sepa-
15 rates us is the basis of royalty, and by basis of royalty
16 we mean on what we calculate -- to what do we apply the
17 percentage rate which applies under the contract.

18 Q. And that currently is what basis?

19 A. Well, the BIEM contract states that the basis
20 of royalty will be the fixed or listed retail price of the
21 record in question.

22 Q. And why is that issue creating a serious problem
23 for the record industry and for the publishers?

24 A. May I supplement the answer to the last question --

25 Q. Yes.

1 A. -- before I -- should there be no list or fixed
2 price, the BIEM contract does then go on to provide for
3 suggested prices, to serve as a basis for royalty, and even
4 in the absence of suggested prices, there are provisions
5 for establishing a basis of royalty. I should have really
6 added that to the first question you put.

7 COMMISSIONER GARCIA: Excuse me -- what are those
8 bases?

9 THE WITNESS: Do you mean, in the absence of
10 fixed or suggested?

11 COMMISSIONER GARCIA: Yes.

12 THE WITNESS: Well, in practice, what would
13 happen is that the BIEM Society would unilaterally fix a
14 basis, which would be determined with reference to the
15 highest price charged by the largest producer in the country
16 in question.

17 BY MR. FITZPATRICK:

18 Q. Mr. Thomas, if there is no BIEM contract signed
19 at the end of 1980, what are the possibilities that face
20 the record industry and the publishers?

21 A. If there is no agreement by the end of 1980, and
22 there is no agreement to prolong yet again the existing
23 contract, we will be faced with what is called a contractless
24 situation, which has happened before.

25 It means that no new recordings can be made in the

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1 continent of Europe, and it means that after a period of
2 six months of a contractless situation, existing matrixes
3 cannot be exploited. That means that you can't continue to
4 press or manufacture records which were recorded while the
5 contract was valid.

6 Q So, you are saying that there can be no new
7 recordings, and after six months, older recordings can no
8 longer be pressed. So, if there isn't an agreement, if
9 there is neither an agreement nor an extension, then in some
10 countries, at least, the recording process would just come
11 to a halt, is that correct?

12 A That is right. I'm glad you said "some countries,"
13 because in several, in Germany and the Netherlands, the law
14 provides for something like compulsory license, in the
15 absence of a contract, so that the record companies would not
16 be stopped in their tracks, but in other countries, like
17 in France and Italy and Scandinavia, the operations of the
18 record company would virtually cease.

19 Q Now, assuming that there is some contract
20 signed, and that this concern that you stated doesn't come
21 to pass, what kind of contract do you anticipate will be
22 signed at the end of 1980?

23 A Well, what we've been discussing during most of
24 last year and the first half of this year is an interim
25 contract, an interim contract for -- it was going to be two

1 years. More recently, it's been whittled down to 18 months.

2 Q And why would the parties be negotiating for an
3 interim contract at this time?

4 A Well, as I mentioned at the beginning, one of the
5 major issues to be determined is the basis of royalty, and
6 we, on our side, that is, the industry, are absolutely
7 determined that there must be a new basis of royalty in the
8 future BIEM contract, and that's a very major change which
9 we reckon will require about a year to discuss and settle,
10 and about another year to implement, to get computer pro-
11 grams set up, and to put into effect, so two years seems to
12 be a sensible interim period.

13 CHAIRMAN BURG: Excuse me. Explain that "major
14 change" -- elaborate on it.

15 THE WITNESS: Moving away from the present basis
16 of royalty, which is the retail price, either fixed or
17 suggested or notional -- and I'll explain what I mean by
18 notional, if you wish --

19 CHAIRMAN BURG: We've had that explanation, thank
20 you.

21 THE WITNESS: You have? Fine, then, to move
22 away from that to something else, and what we are discussing
23 is a royalty, based on the wholesale price, supplemented
24 by a margin, to bring it up to a kind of a retail level that
25 approximates to the prices paid by the public.

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1 That is the major change which we reckon will
2 take quite a long time to digest.

3 BY MR. FITZPATRICK:

4 Q. And let's follow up on that change. As I under-
5 stand, this new formula that you are discussing is PPD.

6 A. That is right.

7 Q. And what does PPD mean?

8 A. PPD stands for published price to dealers.

9 Q. And you have indicated that that price will be
10 adjusted by a margin. Now, in earlier testimony with Mr.
11 Tournier, we described that, I believe, as an uplift system.
12 Is that a proper characterization of what you are discussing,
13 in terms of PPD?

14 A. Yes, we use the expression "markup," but I think
15 it's the same as uplift.

16 COMMISSIONER JAMES: All right, so that I'm
17 clear, that is what is known in this country as wholesale?

18 THE WITNESS: Not exactly. No, we have avoided
19 the expression "wholesale," sir, because wholesale price
20 can mean different things to different people. It
21 depends on the distribution system, as to whether you've
22 got intermediaries or rack jobbers or whatever. So we insist
23 on this expression, published price to dealers, or published
24 price to retailers, because that is absolutely sure. It
25 is the last stage of the distribution chain before the

1 records go to the public.

2 COMMISSIONER JAMES: So a dealer can be a retailer
3 in your system?

4 THE WITNESS: Indeed, PPR might be just as good
5 as PPD -- published price to retailer. We have kept PPD,
6 because it keeps the French people happy. It also stands
7 for prix public aux detaillants, which means -- detaillants
8 means retailers in French, so with PPD they're happy. It's
9 always a problem to have initials that keep the French
10 happy, as well as the others.

11 (Laughter.)

12 COMMISSIONER JAMES: Well, I'm really confused.
13 Is it then similar to what has been traditionally referred
14 to at these hearings as the suggested retail price?

15 THE WITNESS: No, the PPD is a price to dealers
16 or retailers, to which you must add a markup.

17 COMMISSIONER JAMES: Oh, I see.

18 THE WITNESS: Then you get your retail price.

19 COMMISSIONER JAMES: Thank you.

20 BY MR. FITZPATRICK:

21 Q. That system is an attempt to artificially recon-
22 struct a retail price, against which deductions might
23 be taken, or exclusions might be taken, which would then give
24 you a net base, and then it would be against that that the
25 royalty rate would be applied? Is that a fair -- without

1 testifying, a fair summary of where we are?

2 A. Yes.

3 COMMISSIONER JAMES: I'll permit you this time.

4 BY MR. FITZPATRICK:

5 Q. Now, does the fact that there is going to be an
6 interim contract mean that there are going to be no more
7 long-term, five-year BIEM contracts signed in the future?

8 A. No, I think the intention is that there will
9 continue to be contracts. They have historically tended
10 to run at five-yearly intervals. I think that they will
11 revert to that pattern. On the other hand, it's possible that
12 if one were to find a formula -- this has not happened in the
13 past 50 years, so it's unlikely, but if one were to find
14 a formula that kept both sides happy for more than five
15 years, then we might be spared these expensive negotiations
16 that we have to indulge in.

17 Q. Now, what will BIEM and IFPI be doing during
18 this interim two-year period?

19 A. Well, they will be practicing the PPD in the
20 interim contract, but in the meantime, they will be
21 studying alternative bases. There are two areas which have
22 been set down for study. One is a proposal from BIEM, in
23 fact, from the president of BIEM, and that is a higher rate
24 of royalty, which should be applied to the PPD itself.

25 Q. That is without a higher rate on what might be

1 roughly called the wholesale price?

2 A. Right, or list.

3 Q. A higher rate, against the wholesale price -- that
4 is one proposal?

5 A. That is a BIEM proposal, and on our side, from
6 IFPI, there is a proposal for a flat rate royalty, which
7 in fact would be similar to what you have in this country.

8 Q. All right. Now, these study groups, during the
9 two-year period, will they require a great deal of work and
10 attention? Do you anticipate --

11 A. I think so. Indeed, yes, we will have to do a
12 great deal of research into what royalty payment levels
13 have been in recent years, in order to determine what would
14 be an equitable alternative in substitution. I think this
15 will call for a great deal of statistical research, and it
16 will inevitably, I'm afraid, involve a lot of meetings.

17 Q. And so, therefore, the switch from one approach to
18 another is only going to be undertaken on an interim basis,
19 with a careful analysis of where you are going with these
20 interim steps.

21 A. Yes. There is an understandable reluctance on
22 both sides to move to find the direction the other one would
23 like.

24 Q. Now, could you give us more broadly, now, a brief
25 description of how the continental BIEM and IFPI systems

1 work?

2 A. Well, the BIEM contract is in fact a document
3 which is negotiated, as I've said, for application, broadly
4 speaking, in the continent of Europe, at five-yearly inter-
5 vals, and it is an outline. It has a certain number of
6 provisions that have got to be, again, negotiated separately
7 at the national level, once the international text has
8 been settled between BIEM and IFPI, so that it, in fact, is a
9 pro forma contract, rather than a contract at all. It's a
10 bit of a misnomer.

11 Q. It is a misnomer to call --

12 A. To call that a contract, I would say, is a mis-
13 nomer, yes.

14 Q. Now, you indicated that there is not only an
15 international pro forma contract, but also a national con-
16 tract, as well. Is that the arrangement, historically,
17 that BIEM has followed?

18 A. No, indeed. In BIEM terms, it's something rela-
19 tively new. Since 1961, there has been this system of a
20 pro forma contract, which is adapted, and which is implemented
21 at the national level by individual BIEM societies.

22 Before 1961, there was a BIEM contract which was
23 administered by BIEM itself, and BIEM was a licensing
24 body, and BIEM centrally licensed individual record pro-
25 ducers throughout Europe, and indeed outside Europe as well.

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1 They moved away, in fact, from a centralized
2 single international licensing body, to something more like
3 a Federal system, where the individual societies granted
4 licenses instead.

5 Q. All right. Now, at an earlier point, you had
6 indicated that the base was a sticking point here --

7 A. Yes.

8 Q. -- in terms of negotiation. Is the 8 percent
9 royalty rate, as well, a matter of discussion and concern, as
10 far as the IFPI is concerned?

11 A. No, we haven't, in fact, discussed the 8 percent
12 We don't think there's much point in discussing the rate of
13 royalty of 8 percent, although there are strong views among
14 many of our members, especially our bigger members, that the
15 rate of 8 percent is excessively high.

16 Q. But it's your view that there is very little
17 opportunity to negotiate on the number, 8 percent, with the
18 BIEM negotiators?

19 A. That's right. I believe that in the original
20 BIEM contract which was negotiated before the war, in the
21 1930's, the rate was 7-1/2 percent. It went up to 8 percent,
22 and it has remained there, and it has become almost a fix-
23 ture, and this is why a lot of the arguments -- you didn't
24 ask me what the other matters under negotiation are, but
25 the matters under negotiation which crop up regularly, are

1 the deductions, and the matters which in practice reduce the
2 8 percent to an effective lower royalty.

3 Q And those matters that effectively reduce the
4 rate are the various deductions that are excluded from the
5 base?

6 A That's right.

7 Q Now, you've indicated that there have been meet-
8 ings -- three meetings already. Those meetings took place
9 where and when, with the BIEM negotiators?

10 A Well, the most recent meeting was in the middle
11 of last month in Rome. Before that, there was a meeting in
12 London in mid-March, and before that, there was a meeting
13 in Bad Godesberg in Germany, in July last year.

14 Q And what are the prospects for further negotia-
15 tions and discussions?

16 A Well, in Rome, it was agreed that there should
17 be another negotiating meeting in Paris in late September
18 of this year.

19 Q So, at this point, can you predict with any cer-
20 tainty that there will be a BIEM contract signed this
21 year?

22 A I wouldn't like to make that prediction. In
23 fact, my own view is that it's unlikely to happen.

24 Q Now, earlier, you had indicated that one of the
25 problems with the royalty base was the fact that certain

1 countries had abolished retail price maintenance. What is
2 the situation, in terms of the legal status of retail price
3 maintenance in Europe?

4 A. Legally, I think most countries in western Europe
5 -- all countries, with the possible exception of Portugal,
6 have abolished resale price maintenance, that is, fixed
7 prices which can be enforced.

8 Q. And is that the same situation in eastern Europe,
9 as well?

10 A. Well, no, I don't know much about eastern Europe.
11 We have very few members there, and they are never concerned
12 with the BIEM contracts, so I'm not sure. But I am told that
13 they have fixed prices. Everything is fixed in eastern
14 Europe.

15 MR. ABRAM: Madam Chairman, only for the purpose
16 of continuity of following Jim, I wonder if you would, as a
17 courtesy, see if Mr. Thomas would distinguish, if there is a
18 distinction, between his testimony with respect to fixed-
19 price maintenance and suggested retail price, there being a --

20 MR. FITZPATRICK: My next question, Morris, is --

21 MR. ABRAM: Okay.

22 BY MR. FITZPATRICK:

23 Q. Beyond the issue of the legal status of retail
24 price maintenance, in how many countries that you know of
25 has there been an abolition of suggested retail price?

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1 A. A legal abolition only in France, but there has
2 been a voluntary departure from the practice of suggested
3 retail prices in a number of countries, certainly, to my
4 knowledge, in England and in Germany, two major markets.

5 Q. Well, now, what does the BIEM system contemplate
6 when -- in a country such as France, you can't use suggested
7 retail price?

8 A. May I refer to the BIEM contract? Is that in
9 order -- so that I can tell you exactly what the procedure
10 is?

11 Q. Yes.

12 A. In practice, they calculate a retail price for
13 the purpose of calculating royalties, but there is a formula
14 included in the BIEM contract. May I read -- "If there
15 are no list" --

16 MR. ZUCKERMAN: Could we get the paragraph?

17 THE WITNESS: You have the contract, certainly.
18 It's article 55. "If there are no lists of fixed or
19 suggested retail prices in the national territory, the royalty
20 shall be calculated upon the price most generally practiced,
21 such price being determined by reference to the highest
22 price charged by the producer per category, for each account-
23 ing period, figuring in the list mentioned in article 75-C,
24 increased by a margin, fixed per category by common
25 agreement between the society and the national group of IFPI."

bd-7-11

1 BY MR. FITZPATRICK:

2 Q Now, for example, in France, is Sondage a pro-
3 cess that is used to establish the actual selling price
4 in circumstances where there are neither fixed nor suggested
5 list prices?

6 A Not to determine the selling price, but to
7 establish a retail price for this purpose. The Sondage is
8 used, in fact, to determine the margin, which is applied.

9 Q Could you describe briefly for the Tribunal
10 what the Sondage procedure is?

11 A It's really a market research, whereby a special-
12 ized company, which is experienced in these matters, makes --

13 CHAIRMAN BURG: Keep your voice up, please.

14 THE WITNESS: -- makes sample purchases in a
15 determined number of retail outlets. They find a cross-
16 section, which would include supermarkets, specialized
17 boutiques, regular disc shops, and so on, and they of course
18 cover the whole country -- provincial, cities, rural
19 centers, and Paris itself.

20 BY MR. FITZPATRICK:

21 Q And the Sondage takes place how often?

22 A I believe it was an annual, but it has not been
23 done since 1978.

24 Q And why is that?

25 A Well, there has been lack of agreement between

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1 the industry and the French BIEM society, SACEM, as to
2 the representative nature of the outcome of the Sondage.

3 Q And so, because of this disagreement, there simply
4 hasn't been a Sondage taken in 1979 or 1980?

5 A That's right.

6 Q And under the -- in the French situation, where
7 you have no suggested list prices, such a procedure is
8 essential, if one is to attempt to establish a retail price,
9 for the purpose of determining the margins and figuring
10 the royalty base?

11 A Well, I wouldn't like to say it's essential, but
12 it seems to be a sensible method, and it has -- it's speci-
13 fied in the contract that a margin has to be used, so while
14 not essential, it's a desirable way of doing it.

15 Q Now, you've indicated a few minutes ago that
16 in France, as a matter of law, suggested retail prices
17 have been eliminated, and you also noted that, as a matter of
18 voluntary determination in the U. K., there is a similar
19 movement away from suggested retail prices. Could you des-
20 cribe for the Tribunal what is happening in Great Britain?

21 A Well, this is a voluntary decision on the part
22 of certain major record companies. They have simply
23 decided that they are no longer going to suggest or recommend
24 retail prices. The companies, if you want to know, are --

25 Q What are the companies?

1 A. They are known in this country. WEA, which is
2 Warner, Elektra, and Atlantic, I believe, those three
3 together, Polygram, and most recently EMI.

4 Q. Now, in Great Britain --

5 COMMISSIONER JAMES: Excuse me. These are all
6 companies that are affiliates of U. S. companies?

7 THE WITNESS: The first two that I mentioned are.
8 The third one is a U. K.-based company.

9 BY MR. FITZPATRICK:

10 Q. Well, now, with the elimination of suggested
11 prices in Great Britain, what will be the substitute procedure
12 there for the determination of the royalty base?

13 A. Well, they haven't settled that matter yet. It is
14 under discussion. There is a statutory royalty system in
15 the United Kingdom, but there is also an industry contract,
16 and that industry contract -- when I say industry contract,
17 I mean a contract between the music publishers and the
18 record producers.

19 And that contract has been under discussion
20 for upwards of two years, in fact, since the Francis
21 report appeared, and it's in the context of those negotiations
22 that this question of what to do, in the absence of sugges-
23 ted recommended retail prices, has come out.

24 Q. So this has been under discussion for two years,
25 and there has been no resolution?

1 A. I'm sorry -- I don't want to mislead the
2 Tribunal. The contract has been under discussion for two
3 years. The question as to what to do about suggested retail
4 prices is more recent, but it has not yet been concluded.

5 I attended one meeting where this was under dis-
6 cussion, and they appeared to be, as far as the industry
7 is concerned, inclined towards the solution which we favor
8 for BIEM, that is, the interim BIEM contract -- PPD plus
9 markup.

10 Q. And, just as a diversion at this point, the
11 markup that you are describing, which gets you from factory
12 price, or wholesale price, up to this constructed retail
13 price, is that margin to be negotiated between IFPI and the
14 BIEM Society, on an international basis, or would it be
15 negotiated on a national basis?

16 A. I don't think it could be negotiated interna-
17 tionally. It would have to be negotiated country by country,
18 and it would be quite different from country to country.

19 Q. And would that margin be subject to periodic
20 review?

21 A. I think it would need to be, because market con-
22 ditions change, and it would need to be reviewed, certainly,
23 every year -- perhaps every six months.

24 Q. Now, coming back to England for a moment, you
25 have noted that you had a statutory system of compulsory

1 licensing there. Is the voluntary license an adjunct of
2 the compulsory licensing system in Great Britain?

3 A. Well, the statutory licensing system, as such, is
4 not practiced to the letter at all, to my knowledge,
5 because it is a very cumbersome procedure, from an admini-
6 strative point of view, and it would in fact involve sticking
7 an individual stamp on every record, which would not be a
8 realistic thing to do, except for a very small operation.

9 So, in fact, everybody uses what is called the
10 MRS contract.

11 Q. And MRS stands for --

12 A. MRS stands for Mechanical Rights Society.

13 Q. Now, what are IFPI's proposals for devising a
14 substitute for the fast-disappearing -- possibly disappearing,
15 suggested list price?

16 MR. ZUCKERMAN: Let the record note that the "fast"
17 is Mr. Fitzpatrick's word, and not --

18 MR. FITZPATRICK: Yes, that's fair.

19 CHAIRMAN BURG: I do think that's fair.

20 MR. FITZPATRICK: I accept that.

21 THE WITNESS: May I have the question again?

22 (The record was read back by the reporter.)

23 BY MR. FITZPATRICK:

24 Q. This might cut through -- you've earlier indicated
25 that one of your alternative proposals is the PPD. Is that

1 system now in place in some countries in Europe?

2 A. Indeed it is, yes. It's practiced, certainly, in
3 Germany and in Scandinavia. I've got a chart somewhere --
4 but in a number of countries -- Spain.

5 Q. Now, let's turn next to your indication that
6 there will be a study group on a flat rate proposal. How
7 does your contemplated study of a change to a flat rate
8 system, fit into your interim contract, as far as the PPD?

9 A. Well, when we proposed it, and when we formulated
10 this proposal for a flat rate system, we thought that this
11 was a serious and viable alternative proposal to discuss
12 with BIEM. But since M. Tournier gave evidence here,
13 we realized that perhaps, as far as BIEM is concerned, it is
14 not taken seriously, so I'm not sure now whether we will in
15 fact spend a great deal of time on it. But that, we have
16 to discuss with BIEM when we next meet.

17 Q. And as far as IFPI was concerned, the proposal
18 was and is a serious proposal?

19 A. Oh, indeed. Well, of course, nothing has
20 happened to change our policy, and it is that -- that is
21 our desired aim.

22 Q. And was M. Tournier's comments that this was a
23 matter of courtesy, in terms of participating in a flat rate
24 study, one that comes as a matter of surprise to the IFPI
25 officials?

bd-7-17

1 A. That would be putting it mildly. It was a matter
2 of shock and dismay.

3 Q. Now, why is the IFPI interested in pursuing a
4 flat rate proposal, in its negotiations with BIEM?

5 A. Well, ever since I have been with IFPI, and
6 have been involved with mechanical rights matters, it has been
7 an aim and a desired objective, to simplify the BIEM con-
8 tract. And one of the most simple systems, or bases of
9 royalty, that you could possibly have, would be a flat-rate
10 system. So, simplification of the contract is the major
11 motive or reason for our putting that forward.

12 Q. Now, could you give us, Mr. Thomas, some history
13 of the development of the flat rate proposal in the IFPI
14 negotiations?

15 A. Well, as I say, it is and was put forward
16 formally to BIEM in the March meeting, which is the second
17 of the three meetings that I talked to you about. It was
18 formulated as a precise proposal in the context of these
19 negotiations during the later part of 1979, and the first
20 quarter of 1980.

21 But, prior to that, it had been a subject of
22 study in a number of meetings of the IFPI Copyright Committee,
23 and in fact I did a paper on it myself at the beginning of
24 last year, before these negotiations really got underway at
25 all.

bd-7-18

1 Q It's been suggested here that the IFPI proposal
2 to advance a flat rate, was, as has been described, part of
3 the Ertegun phenomenon, that this proposal was somehow
4 initiated, spawned, by Mr. Ertegun, apparently to have some
5 impact on this proceeding. Could you give us your comment,
6 again, as to the interrelationship of Mr. Ertegun's pre-
7 sidency and the history of the development of this proposal
8 at IFPI?

9 A Well, the only connection between Mr. Ertegun
10 and this proposal is that he is in favor of it. But he
11 is not the originator of it, and he is not the only person
12 who is in favor of it, and in fact a large majority of the
13 board of the IFPI. The minority, who didn't support it,
14 didn't express any view to the contrary.

15 COMMISSIONER JAMES: Well, I think the question
16 that he was trying to -- did the proposal originate under
17 his presidency, or did it originate prior to him assuming
18 the presidency?

19 THE WITNESS: As a specific proposal -- I'm
20 sorry, I've got the question now, and thank you, I will try
21 again.

22 COMMISSIONER JAMES: That was your question, wasn't
23 it?

24 MR. FITZPATRICK: Yes.

25 THE WITNESS: A specific proposal in the context

bd-7-19

1 of these negotiations? It did occur in Mr. Ertegun's
2 presidency, because he became president in May last year,
3 and we made the proposal to BIEM in March of 1980, and we
4 formulated the proposal in the latter part of 1979, and
5 early '80. But, as I say, the desirability of a flat rate
6 system goes back much further.

JW8-1

1 BY MR. FITZPATRICK:

2 Q Let's turn for a moment to some of the adjustments
3 that you had indicated between the royalty base and the actual
4 royalty -- initial royalty base and adjusted royalty base
5 against which the five or eight percent is applied.

6 The first area I would like to talk with you about
7 is: Do some BIEM contracts make allowance for the gulf, the gap,
8 between suggested list price and actual price?

9 A Well, the standard contract as such does not pro-
10 vide for any such filling of a gap but in Belgium and in
11 Holland they have negotiated a deduction of 7 percent to help
12 compensate for that gap.

13 Q Just as a matter of -- so we can keep these national
14 arrangements straight. Let me -- we have distributed to the
15 Tribunal an exhibit which I would like marked and included in
16 the record. It is stated: "How royalty rates are calculated
17 abroad."

18 CHAIRMAN BURG: What exhibit number is this going to
19 be, Mr. Fitzpatrick?

20 MR. FITZPATRICK: It is the next number. I don't
21 have an answer.

22 COMMISSIONER JAMES: I think that is one of my
23 problems, Madam Chairman, because as I start to correlate this
24 stuff, if you could pre-mark this because it has a way of
25 slipping through the crack.

8-2

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2 MR. ZUCKERMAN: Commissioner James, I think that both
3 sides, the one thing that both sides are in agreement on is
4 that we have each done perhaps less than an adequate job in
5 numbering exhibits. We will submit a schedule of all the
6 exhibits and also assign numbers to them in the order in which
7 they were used.

8 We did try pre-marking exhibits during Mr. Gortikov's
9 testimony and then as the testimony developed, the exhibits
10 were not used in the order and I think that that ended up just
11 causing more confusion with the pre-marking. So that's why we
12 didn't use that system.

13 MR. SHERMAN: We have placed on the record the order
14 of exhibits up through just about the last witness and that is
15 part of the transcript and it's just a matter of tracing back
16 to that and numbering them accordingly.

17 MR. ZUCKERMAN: It was handed to the reporter but it
18 was not made part of the transcript.

19 CHAIRMAN BURG: In some cases you did and in other
20 cases you didn't.

21 MR. ZUCKERMAN: I think that's something that Mr.
22 Sherman and I should get together on and we'll provide a
23 schedule to the Tribunal on both sides.

24 BY MR. FITZPATRICK:

25 Q. Coming back to this chart, has this been developed,
Mr. Thomas, from information that you have collected and

8-3

1 assembled?

2 A. Yes, it is.

3 Q. And the matter that we were just speaking about was
4 the 7 percent discount in Belgium and in The Netherlands which
5 attempts to take into account the difference between suggested
6 list price and actual consumer price? Is that correct?

7 A. I should add that in other countries this difference
8 between actual and suggested prices is taken into account when
9 they negotiate the mark-up. That is, in the column just about
10 the middle of the page, "percent of negotiated margin or
11 uplift," so when they're discussing those figures -- for
12 example, in Spain they have a low mark-up, 28 percent. That
13 would be a reflection of the difference in these prices.

14 COMMISSIONER GARCIA: Excuse me. Would you repeat
15 that?

16 THE WITNESS: I was pointing out that apart from the
17 two examples in the last column, 7 percent in Belgium and in
18 The Netherlands, the difference between suggested prices and
19 actual prices paid by the consumer is a factor taken into
20 account when negotiations take place on the mark-up or uplift
21 and you have figures there for Denmark, Finland, Portugal, and
22 so on in the middle of the column.

23 So there are two ways of compensating.

24 MR. FITZPATRICK: It might be helpful for a moment
25 just to divert and go through with the Tribunal the arrays of

8-4

1 information that are contained on this chart.

2
3 Could you just very briefly walk us through the
4 chart to indicate what the information is that's arrayed here.
5 First, we have the countries on the far left and then the next
6 column is what?

7 THE WITNESS: The next column is the rate of royalty
8 which 8 percent as you can see in the majority of cases because
9 that's the BIEM contract rate. It's a 6.25 in the U.K. -- I'm
10 sorry, there's a misprint but I hope it's clear -- 6 1/4 per-
11 cent at the very bottom. There's a different rate in Japan and
12 a different rate in Australia.

13 BY MR. FITZPATRICK:

14 Q All right. Could you just briefly describe the next
15 column, the minimum rate?

16 A Well, in the BIEM contract there is a provision for
17 a minimum royalty and the general rule is that a minimum
18 royalty will be three-quarters of the royalty that will be paid
19 on the most-sold category of records.

20 That may in practice be settled at a fixed sum. As
21 you will see, it's given in Denmark and Finland, the whole of
22 Scandinavia. It is one Danish krone. It's one Deutschmark in
23 Germany for certain reports. I think there's a minimum for other
24 categories. Elsewhere it is set at 75 percent under the BIEM
25 contract.

Q Now, the next three columns relate, I guess, to the

8-5

1

2 two ways one can determine the base that you've been talking
3 about to which the royalty rate is applied.

4

5 We have in the first column "retail price less
6 deduction" and there are certain countries that follow that
7 approach.

8

9 A. That's right. The first three, for example, they use
10 retail price and those which are marked "yes" on the second
11 column are those which practice the mark-up or the uplift
12 system.

13

14 Q. And then the column called "percent of negotiated
15 margin or uplift," that column goes with the people in the
16 second approach.

17

18 Are each of these percentages of uplift negotiated
19 on a national basis?

20

21 A. They are. Yes, they've all been negotiated nationally.

22

23 Q. And then the next column involves taxes --

24

25 A. It's "yes" in every case except Australia. There's a
question mark above -- perhaps that should be a question mark.
Nobody is ever sure what happens in Ireland.

26

27 Q. And the next set of numbers deal with the packaging
28 deduction. Could you just briefly explain that? We'll be coming
29 back to that in more detail later but just briefly --

30

31 A. Well, the standard packaging deductions provided for
32 in the BIEM contract are 6 1/2 percent for LP's, 4 percent for
33 EP's and singles. There are, in fact, two options but I don't

34

8-6

1 think I need to go into too much detail on those.

2
3 Seventeen percent for cassettes. But these deductions
4 don't apply right throughout. You see that in Germany they have
5 5.5 percent for singles and LP's. You will see that in Italy
6 they don't apply the 17 percent for cassettes. They have 6 1/2
7 percent. Japan is different again but that's not really a BIEM
8 country. And in the UK, of course, there are no deductions at
9 all.

10 CHAIRMAN BURG: Mr. Thomas, as I recall Mr. Tournier's
11 testimony the 17 percent deduction for the cassettes is at a
12 high mark now or that's going -- the intent is to have that
13 lowered?

14 THE WITNESS: It's high for BIEM. The BIEM people
15 consider it's too high. We are prepared to concede that it could
16 come down a bit provided that the deduction for LP's goes up
17 because we reckon that's too low.

18 MR. FITZPATRICK: Indeed, that's one of the sticking
19 points in the negotiation that make you somewhat pessimistic
20 at this point?

21 THE WITNESS: Just one of the factors, yes.

22 BY MR. FITZPATRICK:

23 Q. Now, stepping away from the chart for a moment, after
24 the BIEM international and national agreements are signed, are
25 there any negotiations about the applicable terms as they apply
to individual tunes?

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A. Individual --

Q. Individual tunes, individual songs or compositions.

A. No, sir.

Q. So there is no song by song or composition by composition negotiation away from the BIEM system?

A. No. The only case I've ever had of anything of that nature is where someone other than a record producer wants to give away a disc with cornflakes or something that is promotional, not records per se. If you want to make a record for some publicity purpose or other, then you have to negotiate outside the BIEM contract and then, of course, there would be a tune by tune rate.

Q. Now, speaking of bargaining and bargaining power, Mr. Tournier had indicated that the European manufacturers must be resigned to the 8 percent rate because they agree to it in free negotiations.

Would you comment in terms of the idea of free negotiations historically over the BIEM rate?

A. Well, my own impression is that these negotiations are not free because the BIEM societies are a monopoly. They -- if you're a record producer you either have a contract with a BIEM society or you go and do some other kind of business because there is no other way.

Q. Why is it that this year you apparently believe that the balance of power in terms of bargaining is somewhat different

8-8

1 and that there may be a bargain to impasse here? Is the bar-
2 gaining power situation different than it used to be?

3 A. Well, I think it's different from what it was in the
4 early days and I talk about the days before my time with IFPI.
5 I believe from what I've been told by those who were involved --

6 MR. ZUCKERMAN: Madam Chairman, I'm going to object
7 if we're getting into hearsay testimony because we'll have the
8 same problem on cross-examination.

9 MR. FITZPATRICK: I think that this is information in
10 terms of a person who has been a senior official of IFPI in
11 terms of the history of his organization. Mr. Tournier told us
12 about BIEM all the way back to his daddy in 1929 when he founded
13 that organization.

14 I think he new about the history of that organiza-
15 tion. It's clear that Mr. Thomas knows about the history of
16 this organization and I would hope that he could give the Tri-
17 bunal the benefitt of his understanding of that history.

18 CHAIRMAN BURG: Objection overruled and will you
19 withhold the question and restate it after a brief recess, Mr.
20 Fitzpatrick?

21 (A short recess was taken.)

22 MR. ABRAM: I think I should say, Madam Chairman,
23 what I'm going to say and make the objection I'm going to make
24 on the record with the preface that I have with the utmost
25 respect for Mr. Thomas and for Mr. Fitzpatrick; and that

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JW9-1

consequently I'm not in any way casting any debility upon the quality of his testimony.

But I do want to say that as a member of the Bar for now almost 40 years, I have customarily when examining a witness or seeing a witness examined who uses notes to refresh his recollection, I have always asked to see those notes and have never been denied them.

Now, I am not asking to see the script from which Mr. Thomas is testifying. I realize he is not reading. I understand that and to avoid this intervention and objection I spoke to Mr. Fitzpatrick and asked him whether or not they were working, as it appears to me, from a script, questions and answers, one in the possession of Mr. Fitzpatrick, one in the possession of Mr. Thomas who by the way is a barrister.

And I was assured, I think I'm right, by Mr. Fitzpatrick that indeed that is the method.

MR. FITZPATRICK: Excuse me. That is the what?

MR. ABRAM: That is what is there. The method.

Now, I'm not saying -- as I said at the beginning -- that he is reading but, for example, if we were to inquire, I think, into the quality -- I'm not speaking of veracity or anything like that but the quality of the testimony, and the questions that normally go to the value of evidence, I would have inquired who prepared the script?

Was it his questions and his answers or Mr.

JW9-2

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2 Fitzpatrick's questions and the answers that he suggested or
3 did they do it together? You see, these are the ways in which
4 the quality of testimony is tested.

5 Now, this is not proceeding by written affidavits or
6 depositions. This proceeding is proceeding by the use of live
7 witnesses. And this is the second time -- and maybe there have
8 been others. Mr. Cornyn was one in which the witness appears
9 to be operating from a scriptive question and answer which I'm
10 not permitted to see unless I ask for it and the Tribunal permits
11 me to. Now, I don't want to go that far. But I object very
12 strongly to this method.

13 MR. FITZPATRICK: Let me say this "method" is a matter
14 that Mr. Thomas and I talked about questions and answers as I
15 presume that you and Mr. Nathan talked about questions and
16 answers.

17 I think it is quite apparent that Mr. Thomas has been
18 talking to the Tribunal in terms of responding to my questions.
19 He hasn't been reading a script. I must say, Mr. Thomas/ I hope
20 we know where we're going in terms of a sequence of questions
21 and I trust I have an idea what his answers are going to be to my
22 questions. That should come as no surprise to one of America's
23 great trial lawyers that you go through testimony beforehand.

24 COMMISSIONER JAMES: I don't think he's objecting to
25 that.

MR. ABRAM: I'm not objecting to that.

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JW9-3

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2 MR. FITZPATRICK: Well, I don't know what he's object-
3 ing to.

4 COMMISSIONER JAMES: I'm sure you will agree whether
5 or not his point is well-taken in your practice before judges
6 in live courtroom situations that what he is indicating is, I
7 would say, 99 percent of the way it goes down when a witness is
8 on direct examination referring to notes that there is usually
9 a courtesy extended.

10 MR. FITZPATRICK: I must say if it would make Mr.
11 Abram happier to look at notes, fine. We have not asked his
12 parties -- we have gone through this whole proceeding with wit-
13 nesses being well-briefed to move things along knowing what the
14 questions are and knowing what the answers are.

15 I have not asked anyone for notes. I hadn't asked the
16 songwriter witnesses who read statements into the record, read
17 answers, for their written material. I had not thought we were
18 proceeding with that formality.

19 Mr. Thomas is clearly answering my questions spon-
20 taneously, looking you in the eye, looking me in the eye.

21 COMMISSIONER GARCIA: Mr. Fitzpatrick, refresh my
22 memory. Which one of the publishers read a statement?

23 MR. FITZPATRICK: Songwriters.

24 COMMISSIONER GARCIA: I mean songwriters. They didn't.

25 MR. SHERMAN: Mrs. Whitecup, I remember.

CHAIRMAN BURG: And Drake.

9-4

1 MR. SHERMAN: That was an opening statement but I
2 remember Mrs. Whitecup's.

3 MR. ABRAM: Madam Chairman, may I be clear? I just
4 want to make one thing clear before you intervene, if I may.
5 Not one single witness from this table has been scripped. It is
6 true that we would be very foolish and imprudent to put a wit-
7 ness on the stand without discussing with him the testimony
8 but not one single witness has had questions and answers which
9 is with him on the table at all, and certainly not questions
10 and answers that correspond, I gather, precisely to the
11 questions and answers of the book that Mr. Fitzpatrick is
12 using. That's my point.

13 CHAIRMAN BURG: Mr. Abram, Mr. Zuckerman, as I re-
14 call, brought this up with Mr. Cornyn --

15 MR. ZUCKERMAN: I made the same objection with respect
16 to Mr. Cornyn.

17 CHAIRMAN BURG: All I can say is that I have been --
18 with each witness have been following and watching everything
19 they say and he nor this witness appear to me to be reading
20 from a script. If they're doing it, they have committed to
21 memory an awful lot of information.

22 MR. ABRAM: They turn pages simultaneously with Mr.
23 Fitzpatrick.

24 MR. FITZPATRICK: Indeed, he is following fairly the
25 sequence of questions. I would say every witness here is under

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oath. Every witness here is under oath. What Thomas, what Mr. Nathan, what Mr. X or Y or Z or Miss X, Y, or Z are saying is under oath. It is quite clear that Mr. Thomas is answering these questions; he's giving his answers. I think this is a tempest in a teapot.

COMMISSIONER JAMES: Can he give the answers without the documentation?

CHAIRMAN BURG: He's been giving the answers. He hasn't been looking at the --

COMMISSIONER JAMES: That's not my question, Madam Chairman.

MR. FITZPATRICK: Of course he can. If that would make you or Mr. Abram more comfortable I'm sure that's fine.

COMMISSIONER JAMES: It doesn't matter to me one way or another. An objection has been raised. I'm just trying to get a way out so you can keep on moving.

MR. FITZPATRICK: Well, we had a way out -- I mean, if this is somehow a big thing with Mr. Abram we will just proceed without -- he doesn't have to follow the questions. If that would make everybody happier. I think it's a bit of foolishness but if Mr. Abram wants to go that way, fine.

MR. ABRAM: Well, I want a clean record, Jim, and --

MR. FITZPATRICK: I want a clean record too and I don't like the insinuation that somehow this man's testimony under oath lacks any veracity that any witness that you brought

9-6
1 on, that you brought in here after having him well-prepared,
2 and I resent the idea that somehow we're pulling something fast
3 and loose on the Tribunal.
4

5 This man is under oath. Cornyn was under oath. The
6 answers he has given are his answers. He is looking the Chairman
7 in the eye and giving them.

8 MR. ABRAM: Jim, I preface this by saying -- and I'll
9 state it again. I don't know why it's necessary but I am not
10 in any way imputing the veracity of Mr. Thomas in any way. I
11 respect him. I like him. I have no question about that.

12 MR. FITZPATRICK: Some of your best friends are Mr.
13 Thomas's.

14 MR. ABRAM: And I'm not questioning your profession-
15 alism. I'm questioning a procedure which is extraordinary.

16 MR. FITZPATRICK: We will obviously abide the ruling
17 of the Chair. I don't want any diversion at all from the impact
18 of Mr. Thomas' testimony which I believe is important and
19 crucial and central and I will proceed in any way the Chairman
20 directs me because I don't want any question at all on this
21 record about the impact and the veracity of his testimony.

22 CHAIRMAN BURG: Speaking for myself, I have no
23 objection --

24 MR. FITZPATRICK: Let's close the book and let's go
25 ahead.

CHAIRMAN BURG: Fine.

9-7

1 BY MR. FITZPATRICK:

2 Q When we concluded earlier, we were talking about --

3 CHAIRMAN BURG: I asked you to restate a question
4 that you --

5 MR. FITZPATRICK: I am going to restate a question.

6 BY MR. FITZPATRICK:

7 Q When we concluded, we were saying that the bargaining
8 power of the industry might be somewhat different today than it
9 was in the early days of the BIEM contract. And I asked you to
10 try to give your understanding of the changes in the position of
11 the industry that might today make it more willing to dig in its
12 heels in these negotiations.

13 A I can answer this question without recourse to
14 hearsay because there is a new situation as compared with 20
15 years ago when I believe that BIEM was in a much stronger
16 position. The new element is the European Economic Commission,
17 the Common Market Commission, which has a powerful and vigilant
18 competition department, which has already examined several of
19 the BIEM societies and caused them to change their statutes and
20 their practices.

21 Q And what is the nature of the EEC concern with BIEM
22 practices and procedures that might have been under challenge?

23 A Abuse of dominant position, and the restraint of
24 trade within the Common Market, those two factors.

25 Q And those are contained in Articles 85 -- those

standards are contained in Articles 85 and 86 of the EEC --

A. The Treaty of Rome.

Q. -- the Treaty of Rome. Let's move for a moment if we could to that series of numbers on the right dealing with packaging deductions.

I think you earlier indicated that the general packaging deduction was four percent for singles and 6.5 for LP's and 17 for cassettes.

Could you tell us what is IFPI's position on the sleeve deduction in the current BIEM negotiations?

A. The position of IFPI on sleeve deductions, that is, disc sleeve deductions is that those deductions are inadequate. Sleeves cost a great deal more relatively to other processes, to manufacture, to design, and to prepare than was the case when LP's were introduced back in the '50's.

Q. And so it is your bargaining position that that LP sleeve deduction should be increased?

A. Yes.

Q. Now, Mr. Tournier testified -- on Page 138 on his first day's testimony -- that the 6 1/2 percent deduction was agreed to essentially as a matter of grace by BIEM because of the superior quality of the sleeve.

Do you agree or disagree with that characterization?

A. No, I don't agree with it. I'm very familiar with it because I've heard it many, many times.

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Q. And what was the record company's position on the sleeve deduction and the added packaging costs that were involved in the creation of high quality LP jackets?

A. The position of IFPI has always been that the sleeve and the cost thereof has nothing to do with the author-composer of the music; and that the author-composer of the music is not entitled to a royalty on that part of the price which is accounted for by the cost of that sleeve.

Q. Is it fair to say that the sleeve deduction is a method of adjusting the 8 percent royalty rate without taking that 8 percent rate on head on?

A. It has appeared to have become so, yes.

Q. In terms of the 17 percent cassette deduction, what is your negotiating position on the packaging deduction on cassettes?

A. I must make an observation on your question. It's not quite a packaging deduction this time because it is a technical deck, as we call it, rather than a packaging.

This happens to be a cartridge but the same principle applies. There is more than packaging involved there. There are little wheels and buttons and bits and pieces and there's an outer case. That's what we sought a deduction for. That is what we established the cost of when we first discussed these matters with BIEM and it is on account of those factors that BIEM agreed originally to grant a 24 percent deduction for

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cartridges like this and 20 percent for cassettes. Those levels have come down to 17 percent in the current contract.

And to now come to your question, our position is that because these things have become cheaper unlike LP covers which have gone up, these things have become cheaper to manufacture, there is in the IFPI position room for maneuver downwards but only on the distinct understanding that we move up on the LP covers.

Q. And in terms of that deduction first being negotiated, was the principle the same as on the jacket that there were expenditures to which the authors and composers had made no contribution?

A. As far as the industry side is concerned, yes, that was the position. The copyright owner had really no right to claim a royalty on the nuts and bolts but on the BIEM side, they claimed and continue to say that they were making a gesture in aid of a new form of product and would help the industry by way of deduction to get it on the market.

CHAIRMAN BURG: Mr. Thomas, when you say there's room to come down on that to set deduction only if the deduction of the LP moves up, what does your organization have in mind?

THE WITNESS: We haven't, believe it or not, although we've had three meetings, we haven't discussed specific figures but I can tell you that from informal discussions on our side we would be happy to come down from 17 percent to, say, 15 in

9-11

1 return for one percent increase or proportionately either way.

2 CHAIRMAN BURG: So 6.5 would become 7.5 or --

3 THE WITNESS: 7 1/2 -- yes, something like that.

4 BY MR. FITZPATRICK:

5 Q. Now, we've talked about the column on the right which
6 is in certain instances to reflect differences between sugges-
7 ted retail price and actual marketing levels. And we've talked
8 to the next three columns moving from right to left which are
9 packaging deductions.

10 The next line deals with taxes. Would you describe
11 whether the exclusion of taxes from the royalty base is common
12 in Europe and under the BIEM system?

13 A. As you see, throughout Europe taxes are deducted
14 from the retail price before calculation of royalty.

15 MR. ZUCKERMAN: I'm sorry. Could we have a clarifica-
16 tion on what taxes you're referring to?

17 THE WITNESS: The easiest way to clarify that is to
18 read from the contract if I may, Madam Chairman.

19 CHAIRMAN BURG: You may.

20 THE WITNESS: "In the calculation of royalties, VAT
21 purchase tax, sales tax, luxury tax and any other identical
22 or similar tax shall be deductible."

23 BY MR. FITZPATRICK:

24 Q. And then, Mr. Thomas, does the next paragraph permit
25 the further deduction of additional taxes on the basis of

90.12

1 national agreement?

2 A. Yes, if new taxes are devised then they have to be
3 settled at national level.

4 CHAIRMAN BURG: And in listing these countries, you
5 say all the European countries do with the possible exception
6 of Ireland which you question.

7 THE WITNESS: Yes, yes.

8 BY MR. FITZPATRICK:

9 Q. To your knowledge, have taxes always been excluded
10 from the royalty base?

11 A. No. I understand that -- and this is again before my
12 time -- but from reading records I have observed that taxes
13 were included in some countries and that there has been one
14 argument which happened to be in Portugal where there was a
15 tax on transactions where the BIEM Society claimed that that
16 tax should not be deducted. IFPI won the argument.

17 Q. And the publisher argument in those earlier days was
18 that the taxes should be included in the base; is that correct?

19 A. Yes.

20 Q. And as it stands now, taxes are excluded as a matter
21 of negotiation along with packaging and any other deduction
22 that is negotiated?

23 A. That's right. It is no longer a contentious matter;
24 it is accepted.

25 Q. Now, in our earlier discussion with Mr. Tournier, he

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took issue with our analysis of the royalty rate in France in which we had concluded that as a matter of the comparing the royalty as a percent of actual consumer price, that that royalty was not 8 percent or 7.46 as he had indicated, but 5.1, when one computed the actual royalty after service charges as a percent of consumer price.

Could you comment upon the validity from your perspective of this analysis in which one takes a royalty as a percent of the price the consumer pays?

A. I think it's an interesting exercise; I don't see anything wrong with it. In fact, I find it quite constructive.

Q. And if one were to compare the French royalty rate with the United States royalty rate where you are applying a royalty to the price the consumer pays or suggested list price, would this in your judgment provide information that might put the actual royalties country to country in some kind of perspective?

A. Yes. It seems to me to be a way of comparing like with like.

Q. No, so far you have talked about a variety of deductions that are applicable once one arrives at the royalty base. You have talked about taxes coming out; we've talked about packaging coming out; we've talked about a variation for pricing coming out.

You have indicated that there are some reductions

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down to a base against which the royalty rate has been applied.

Have you done any analysis of the comparison of the suggested price and the royalty base?

A. Well, we have done that, in fact, in preparation for the current negotiations some comparisons and you will see that they are set out in this table.

MR. FITZPATRICK: Could we distribute these and have these marked with the next proper number?

CHAIRMAN BURG: Whatever that is.

MR. FITZPATRICK: Whatever that might be.

BY MR. FITZPATRICK:

Q. Could we discuss this information which I would like marked for identification and included in the record.

Now, these numbers are in a chart described "Comparison of Illustrative Suggested Retail Prices with Royalty Base, Second Half of 1979 Converted to Dollars."

Could you describe the development of the numbers that are set forth in this chart?

A. Well, we needed some concrete information or guidelines in order to consider the whole question of basis of royalty in order to prepare for negotiations with BIEM. And I am sure you have a great variety of kaleidoscope of prices in this country but it's very, very much more complex in Europe as this table appears.

We, in fact, relied on one company which prepares

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very comprehensive data on copyright calculations for prices. I took the opportunity to check the prices which were extracted from that company's data with independent sources, that is, either other companies in the same country or with the national group of IFPI, permanent official, and the results you will see here divided into two columns.

The retail price as understood by that company, not suggested retail price but as understood by the group in question in the first column; and then the royalty bases which is after deductions in the second column.

Q. And then one had a comparable figure for the top price popular LP and the top price popular cassette?

A. Right.

Q. And taking, for example, Denmark, one there on the popular LP, that might be the widest of the gaps, one has a retail price of \$12.26 and the royalty base against which the percentage is applied is \$7.02; is that correct?

A. That is the figure. It is quite a wide gap but I agree, it's right.

MR. FITZPATRICK: I think we have a question from Commissioner Coulter.

COMMISSIONER COULTER: On your remarks that you used the actual retail price rather than suggested retail price wouldn't apply in the Australian example. I believe they used the suggested retail price.

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THE WITNESS: They may well have done so but I don't --

COMMISSIONER COULTER: Would you calculate their
royalty?

THE WITNESS: The normal practice as I understand it
in Australia is to use the suggested retail price for calcula-
tion of the 5 percent royalty.

COMMISSIONER COULTER: And that doesn't necessarily
equal the retail price?

THE WITNESS: No.

COMMISSIONER COULTER: Because they do have discounts
there?

THE WITNESS: That's right, yes.

COMMISSIONER COULTER: And I don't know to what extent
that applies elsewhere.

THE WITNESS: You see, Australia is the only country
where the two figures are the same, isn't it? Do you see that?
The royalty base is exactly the same as the retail -- the so-
called retail price.

COMMISSIONER COULTER: I understand but the actual
retail price probably on an average is somewhat lower than the
suggested list price which would mean that the royalty base
would be higher than the effective retail price; is that true?

THE WITNESS: To be frank, I would need to go back to
the company in question where this -- Australia is one of the
companies -- because it's a long way away, I did not telephone to

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1 check this particular point.

2 MR. ZUCKERMAN: Madam Chairman, what we now have is
3 an economic study prepared by someone other than the witness
4 before us and presented to the Tribunal at the time of testimony
5 rather than April 7.

6 It is as though instead of calling Doctor Kiser to
7 testify and introduce the CRI study, it was handed up to the
8 Tribunal on the day of Mr. Gortikov's testimony and Mr. Gorti-
9 kov introduced it.

10 If Mr. Thomas has a full familiarity with how the
11 study was conducted and how the analysis was conducted and he
12 can explain that, then we won't object to its introduction. But
13 he doesn't appear to have that familiarity and therefore we do
14 object to it.

15 MR. FITZPATRICK: Let me understand the characteriza-
16 tion of this being an economic study. As I understand the situa-
17 tion, Mr. Thomas referred to a particular company that for pur-
18 poses of negotiation or in the regular course established what
19 the royalty base was in the domestic currency.

20 And I am adding a line here that he had not testified
21 to reflecting my understanding. He then took those numbers and
22 converted them to dollars based upon the change rates in 1979;
23 and we are presenting this here today for the purposes as indi-
24 cated to reflect the fact that there is a significant difference
25 country to country in the retail prices and there are differences

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2 in margin between suggested list and in royalty base in vir-
3 tually every country that is listed here with the exception of
4 Australia.

5 Now I must say we would be most happy to supply the
6 Tribunal with the sheets that Mr. Thomas had worked from in terms
7 of having the data that was supplied by the company that indi-
8 cated the royalty base and the conversion factors, to indicate
9 from where this was drawn.

end take 9

1 CHAIRMAN BURG: Do I understand correctly that
2 you had this prepared for your use in terms of your
3 negotiations?

4 THE WITNESS: It was prepared last year. It
5 became evident while it was under preparation, that it would
6 be of interest to RIAA, and that is how it happens to come
7 to be before this tribunal.

8 MR. ZUCKERMAN: I might inquire, Mr. Fitzpatrick,
9 since Mr. Thomas testified to that, when RIAA learned of
10 the existence of this thing.

11 MR. FITZPATRICK: After it was completed, as far
12 as I know.

13 THE WITNESS: I am not sure. This exercise
14 was done in two phases, and we added some additional
15 countries. And RIAA became aware of its existence after the
16 first exercise was completed, but before the second.

17 MR. ABRAM: May I ask, Madam Chairman, who
18 in RIAA became aware of it?

19 THE WITNESS: Mr. Stanley Gortikov.

20 MR. ABRAM: And how did he become aware of it?

21 THE WITNESS: Because he is a member of the
22 Board of RIAA and was aware of the preparations which I
23 was making for renegotiation.

24 MR. ABRAM: And he requested that other materials
25 be added?

1 THE WITNESS: When I told him of the existence
2 of it, he requested it.

3 MR. ABRAM: And how long ago were those
4 materials added?

5 THE WITNESS: I am trying to recall, sir.

6 MR. ABRAM: Several months?

7 THE WITNESS: Oh, yes, yes.

8 MR. ABRAM: Madam Chairman, I emphatically
9 object to this.

10 CHAIRMAN BURG: Let's take another brief recess.

11 (Recess.)

12 CHAIRMAN BURG: Rather than waste the time, we
13 will cease this line of question;ing and this chart to go on
14 to something else and tomorrow morning when we get back to it,
15 we will rule on your objection.

16 MR. FITZPATRICK: I would only like to say one
17 thing in that connection. From our point of view, this
18 exercise, is not a formality of any economic studies as
19 applied to the rules, it is something that was not an
20 economic study, created for the purpose of this porceeding;
21 but we will leave that decision to the tribunal ultimately.

22 Let me go on. I have a -- just a few more
23 questions. Then we can conclude and take up tomorrow
24 morning as you please, on your questions on cross examination.
25

1 BY MR. FITZPATRICK:

2 Q Does the UK use the Beam sytem?

3 A There are two Beam societies in the United
4 Kingdom, but they are not general licensing bodies, so the
5 answer to your question, really, is "no".

6 Q Not being a part of the Beam system, how is
7 the rate set in Great Britain?

8 A Well, the rate is set by the following. It is
9 6-1/4 per cent by the Copyright Act, 1956.

10 Q And it has been at 6-1/2 per cent, sorry,
11 6-1/4 per cent, for what period of time?

12 A Since 1928.

13 Q And initially the rate was set in your first
14 copy right law?

15 A In 1911, yes. At 5 per cent.

16 Q Now, has there recently been a review of --
17 administratively of the existing 6-1/4 rate in Great Britain?

18 A You mean since 1928? In fact, it has been
19 looked at twice.

20 Q And when was the first time that there has been --
21 that it was looked at?

22 A The first time was in the study which led to the
23 enactment fo the Copyright Act by the Gregory Committee, in
24 the middle 1950s.

25 Q And was any change made at that time?

1 A No.

2 Q And you say there was a second instance.

3 Could you describe that for the tribunal?

4 A The second instance was a tribunal hearing which
5 was convened under Section 8 of the Copyright Act, 1956,
6 and that was in 1976.

7 Q And that is popularly known as the Francis Report?

8 A The Francis Committee and the Francis Report.
9 The Francis Tribunal and the Francis Report, yes.

10 Q For your information, the Francis Report has been
11 filed with the Committee. With the tribunal. Did you follow
12 the progress of the presentation of the evidence in the
13 Francis tribunal?

14 A No, unfortunately I was overseas for a large
15 part of the time.

16 Q Were you generally familiar, however, with the
17 arguments made by the parties?

18 A Yes, I assisted in the preparation. And naturally
19 I read the report that came out.

20 Q Now, you have read the report and you are familiar
21 with the report and its results?

22 A Yes, sir.

23 Q Do you recall in that proceeding, did the
24 publishers advance the assertion that the royalty per record
25 completely apart from any reference to volume, should be the
basis for setting the rate?

1 A That argument was rejected by the tribunal.
2 In their main conclusions, in paragraph 21, bracket 1,
3 which starts, "It is not sensible to regard the value of the
4 royalty per record as the yardstick for determining whether
5 or not the present royalty rate is equitable."

6 Q I think we had read for the tribunal yesterday
7 the remaining portion of that conclusion. Do you recall
8 whether the headroom, what is called the headroom argument,
9 in Great Britain and what Mr. Abrams has described as the
10 wiggle room argument, in this country. Do you recall whether
11 that assertion was -- that formulation was presented to the
12 British tribunal?

13 A It was presented in the Record Royalty Review
14 Association's case.

15 Q Excuse me. That is RRRA?

16 A Yes.

17 Q And could you describe for the tribunal who that
18 group is?

19 A Well, that was in fact a group called by the
20 music publishers and music composers in the UK for the
21 purpose of the statutory royalty inquiry.

22 Q And what was the argument in terms of headroom
23 that was advanced by that tribunal -- by RRRA?

24 A Madam Chairman, may I read? It is stated quite
25 briefly in this case. I am reading from paragraph 8,

1 (2), "An equitable or fair, reasonable rate of royalty is
2 one which represents the pervading market rate ascertained
3 by agreement reached after free collective bargaining between
4 bodies representing the copyrighter, and as on the one hand,
5 and the record producers on the other."

6 In paragraph 13 of that case, the RRRA contend
7 that in order to achieve this result, "the percentage should
8 be pitched sufficiently high to allow genuine negotiation
9 between the parties concerned in respect to the initial
10 recording and also of subsequent recordings."

11 Q Now, do you recall what the position of the
12 record producers was on this headroom argument?

13 A They argued otherwise, and their argument is in
14 paragraph 9(b), part 1, "To fix the statutory rates at a
15 level which would allow headroom for negotiations" is
16 inconsistent with the scheme of section 8 of the 1956 Act
17 which prescribed a fixed rate or minimum amount of royalty
18 deemed by Parliament or the Secretary of State to be
19 equitable.

20 Q So we have the publishers' argument on one side
21 that you should have headroom with negotiations below and
22 you had the record industry argument to say that such a
23 system would be inconsistent with the scheme of Section 8.
24 Now did the tribunal consider and resolve that issue?

25 A The tribunal again rejected the music publishers

1 and composers' argument. In our main conclusions,
2 paragraph 21(2), if I may read once more, "It is also
3 not possible as a matter of law to fix a rate at such a
4 level as will permit an equitable rate to be reached by
5 agreement by way of collective bargaining between composers
6 or publishers on the one hand and the record companies on
7 the other."

8 Q All right, now, coming away from the Francis
9 Report, we have a conclusion there that the rates
10 should not be changed, either the basic rate or the minimum
11 royalty rate. Is there any negotiation over the first
12 recording of the record in the United Kingdom? Is there
13 ever any negotiation on tune-by-tune basis as far as the
14 first recording is considered?

15 A No. I have asked that question myself for
16 all the major record companies in the UK and the answer
17 has been negative in every case.

18 Q And is there any negotiation under the 6-1/4
19 rate in the United Kingdom on cover records on second and
20 third and fourth releases?

21 A None at all, no.

22 Q So the situation in Great Britain is just as it
23 is in Europe, there is no tune-by-tune negotiation.

24 Let me come to the last subject that I wanted
25 to discuss with you. Had you reviewed the NMPA proposal

1 A I have read it. Yes.

2 Q And do you have a copy?

3 A Yes.

4 Q In terms of observations, your observations
5 of that proposal, coming from a country, a position with
6 your experience in connection with the percentage of
7 royalty, could you comment to the tribunal on any of the
8 strengths and weaknesses that you might find in the NMPA
9 proposal?

10 A Well, it is a very basic type of proposal.
11 I would have thought myself that it would need a great deal
12 of elaboration. To give one example, it has no provision,
13 doesn't contemplate any kind of deductions. We have dis-
14 cussed deductions, which are an important part of the
15 European scene. I don't think that there is much argument
16 with the fact that the sleeve is a separate element in
17 which the composers or publishers have a right to obtain
18 the royalty on, and therefore are deemed to be appropriate
19 that the provision should be made for deduction of that.

20 Q Sorry, go ahead.

21 A Well, I am just thinking another thought which
22 has occurred to me, is that of course, it suffers from the
23 defect of suggested retail or list prices being difficult
24 to ascertain in the context of discounting and possibly
25 in the context of the possibility of suggested or recommended
prices being abandoned in the US as they have been in Europe.

1 Q So is your view that some of the same
2 problems that are facing the record industry and being in
3 Europe might be borrowed by this proposal, which
4 likewise is relying upon suggested retail price?

5 A Right.

6 Q Now, in terms of transition time, you note that
7 this is a proposal to substitute a percentage system for a
8 flat rate system. You have been considering fundamental
9 changes in the European arrangement, either a change
10 from percentage to flat rate or indeed just a change within
11 percentage system itself from suggested retail price to
12 PPD.

13 Do you have any observation in terms of the
14 problems or difficulties and the need for a period of
15 transition when one shifts from a flat rate to a percentage
16 system or vice versa?

17 A Well, when -- in the context of Beam negotiations,
18 there was discussion on the possibility or study of a flat
19 rate system for Europe, somebody said that this would be a
20 leap into the dark; and because of that, it would be a leap
21 in the dark from both sides, by the way. It would require,
22 as I have said earlier, considerable time for study and
23 for implementation; and I think the same would apply here.
24 That it would require something very much more sophisticated
25 than we have in front of us, and that it would lead to be
implications that need to be studied in great depth in order

1 to ensure that somebody didn't run into disaster.

2 Q I have no further questions.

3 The last question was, I think the question was
4 how long would it take to implement going back from a
5 percentage to a flat rate.

6 Do you have any idea what kind of time, a year,
7 two years?

8 A Well, I --

9 Q It was studied --

10 A Well, yes.

11 Q I am assuming it is a study whether to adopt that
12 implementation that is under study; would it take a year,
13 two years?

14 A I think a year for implementation, because
15 of -- because, just to give you -- to mention one thing,
16 in Europe, most record companies have to maintain a
17 copyright department to administer their obligations to Beam
18 societies. As far as I understand, that does not apply
19 here. The matter is very much simpler. It doesn't require
20 a lot of copyright clocks and so on.

21 Q A lot of what?

22 A Clerks.

23 Q Oh, clerks. I interpreted -- thank you.

24 Madam Chairman, before we conclude, if the
25 tribunal tomorrow decides on allowing examination of this
comparison that has been furnished, then I think the witness

1 should also be prepared to give us the details of how one
2 jumps from the retail to the royalty base in each category,
3 in other words, we should not be requested to assume the
4 accuracy of all the computations that brings one from the
5 retail to the royalty base in applying the percentage.

6 MR. COULTER: Madam Chairman, if I might
7 ask Mr. Fitzpatrick whether he is going to have any further
8 questions based on the chart.

9 MR. FITZPATRICK: No.

10 MR. COULTER: If he is not going to, we can
11 withdraw our objection.

12 MR. FITZPATRICK: I have no further questions.
13 It was not presented as a price study; it was presented
14 as an illustration of the gap between retail price and
15 royalty base, and if there --

16 MR. COULTER: Excuse me, it was introduced as
17 an exhibit.

18 MR. FITZPATRICK: But it isn't marked. Mr.
19 Zuckerman said if he could -- if I had no further questions,
20 and I have indicated I have no further questions, he withdrew
21 his objections.

22 MR. COULTER: I regret that we didn't get it
23 on April 7, which is when I think we should have gotten it,
24 but if those are the only questions, we will save the
25 tribunal the time of deliberating on it and withdraw the
objection.

1 Or from objecting to what you are saying.
2 MR. ABRAM: One clarification which
3 -- the need for which was suggested by something that
4 Mr. Fitzpatrick said, and he and I have had a little discussion
5 privately on this subject, again going back to my request
6 for the underlying question in the CRI study; my request
7 was for the aggregate end for each of the lines on the
8 questionnaire. And that included some questionnaire answer
9 which may not be explicitly tabulated in the body of the
10 report itself. But which may well be relevant. As an
11 example, there is the section F of the questionnaire, the
12 break-even analysis.

13 I understand there has been some discussion on
14 this already. The report tabulates only the two columns
15 out of 6 or 7 in the questionnaire. I doesn't tabulate
16 them, actually. It summarizes them. But they -- all of
17 these columns are interrelated. They involve allocations
18 of total figures across a range of 7 columns and all of
19 them are relevant.

20 For that reason, our request, just so there
21 be no confusion on it, does ask for the aggregate for
22 each of the questions asked in the questionnaire.

23 CHAIRMAN BURG: We have transmitted that request
24 to Mr. Fitzpatrick.

25 MR. FITZPATRICK: I must say that that --

1 Our earlier discussion was clarified by Mr.
2 Zuckerman, was we were talking about --

3 MR. ABRAM: Mr. Zuckerman did not make the
4 request.

5 MR. FITZPATRICK: It was -- Mr. Zuckerman
6 pitched in. And thr tribunal --

7 MR. ABRAM: It has noth;ing to do with this
8 request. I am sorry.

9 MR. FITZPATRICK: All right. The record --

10 MR. ABRAM: It was not the request.

11 MR. FITZPATRICK: The record showed what it
12 showed. Earlier, there was reference to aggregate data
13 that had been submitted as a supplement to the 1965 or 75
14 study for which my understanding was aggregate data, Exhibit 1,
15 which was the combined profit and loss statement, for the
16 aggregate profit and loss statement for the industry,
17 I know we plan to testify about the problems that came,
18 attended the data in terms of break even on some of the
19 categories, the data not providing a sufficient basis for
20 us to make representation as far as break even on some of
21 the subcategories.

22 I will transmit the -- transmit and consider
23 Mr. -- the composers' request that has been set forth here
24 on the record.

25 CHAIRMAN BURG: I am sorry I asked the question.

1 We got into one of those I do not wish to prolong it, but
2 I did this time. There are no other questions are there.
3 We will -- Mr. Thomspen will be back in the morning.
4 We will adjourn until 10:00.

5 Thank you.

6 (Whereupon, the hearing was adjourned, to reconvene
7 at 10:00, the following day, July 10, 1980.)
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